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REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS,

OF

UPPER CANADA;

FROM MICHAELMAS TERM, 27 VICTORIA, TO TRINITY TERM,
28 VICTORIA.

BY

EDWARD C. JONES, ESQUIRE,

BARRISTER-AT-LAW.

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VOLUME VII.

TORONTO AND BIRMINGHAM:
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JUDGES
OF
THE COURT OF COMMON PLEAS.

The HON. WILLIAM BUELL RICHARDS, J., C. J.]

“ ADAM WILSON, J.

“ JOHN WILSON, J.

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REPORTS OF CASES

IN THE

COURT OF COMMON PLEAS.

MICHAELMAS TERM, 27 VIC., 1863, (*Continued.*)

Present :

The HON. WILLIAM BUELL RICHARDS, C. J.

“ ADAM WILSON, J.

“ JOHN WILSON, J.

JOHNSTON V. GRAHAM.

*Insurance—Agent—Undertaking of to insure—Breach of—Policy—Pleading—
Con. Stat. U. C., ch. 52, sec. 30.*

The plaintiff declared against the defendant as agent of an Insurance Company, alleging that he being the owner in fee of certain premises, subject to a mortgage, had employed the defendant to effect an insurance thereon, according to the rules of the company, but that he (the defendant) had so carelessly and negligently effected such insurance, that a loss by fire having occurred, he (the plaintiff) was prevented, by reason of the careless conduct of defendant in effecting the insurance, from recovering the amount thereof, and was put to great trouble and expense in and about the bringing an action therefor.

The defendant pleaded an assignment by plaintiff to one Graham, the owner in fee, by virtue of a mortgage before the fire and before action brought.

To this the plaintiff demurred.

The defendant also took exception to the declaration on the following grounds :

1s . The amount and duration of the policy are not shewn.

2nd . No negligence by defendant is shewn.

3rd . That no reason was stated why the policy was bad, or that the defect was within the defendant's undertaking.

4th. No agency between plaintiff and defendant shewn, the latter being agent for the company—nor any reward or consideration averred for the undertaking.

5th. That the breach is larger than the promise.

Held, first, that the assignment of the policy by the plaintiff to Graham, was no more than an assignment of an ordinary chose in action, upon which the action must be enforced in the assignor's name.

2nd. That the declaration (set out above) being for a *misfeasance*, did not require an allegation of a consideration or reward to support the action ; but the

defendant having undertaken to do and having done an act gratuitously, was liable for his *misfeasance* in the performance of his undertaking.

3rd That the defendant, after pleading over, could not object to the want of allegation in the declaration of the amount or duration of the insurance ; and, lastly, that the defendant was entitled to judgment for the insufficiency of the count, because negligence generally is different from negligence to insure according to the rules of the company.

The declaration stated that the plaintiff was owner, in fee, of certain premises subject to a mortgage thereon, on which premises were erected certain buildings ; and the defendant was then an insurance agent, and agent for the Niagara District Mutual Insurance Company, and as such agent had full knowledge of the several rules, &c., subject to which insurances on property against loss by fire were effected by the said company, and had full knowledge also of the existence of the mortgage on the premises, and of the plaintiff's title thereto ; and being such agent, and having such knowledge, the defendant applied to the plaintiff to have said buildings insured in the said company. And thereupon the plaintiff, at the special instance and request of the defendant, employed the defendant to effect an insurance on the said buildings in the said company, according to the rules, &c., of the company, and to procure for him the usual and customary policy of insurance from the company ; and thereupon the defendant undertook to effect such insurance and procure such policy ; and although the defendant might have effected a good and valid insurance, &c., in accordance with his undertaking, and the instructions of the plaintiff in that behalf, yet the defendant, not regarding his duty in that behalf, so carelessly, &c., effected the insurance, that the pretended insurance was wholly void. And the plaintiff says that afterwards, and while he was the owner of the premises, &c., subject to the said mortgage, and during the continuance of the pretended insurance, the buildings were accidentally destroyed by fire, and the plaintiff, although he took all proper steps in that behalf, was unable to collect any part of the loss from the company by reason of the careless, &c., manner in which the defendant had effected the insurance, and the plaintiff was put to great expense in and about a certain action which he brought against the company upon the pretended policy, to compel payment of his loss, by means whereof he has lost the amount of this policy and all moneys

paid in effecting it, the said insurance, and the costs of such action and other expenses.

The 4th plea is that after the policy was procured and delivered to the plaintiff, and before the fire, the plaintiff, by endorsement in writing on the policy, assigned all his right, &c., in and to the policy, and the money thereby made payable to one James Graham, who then was the owner, in fee, of the premises by virtue of the said mortgage, and at the time of the fire the said Graham was the person entitled to receive from the company any moneys payable under the policy.

Demurrer to plea, because it furnishes no answer to the said count—the policy not being assignable at law—and because it is not shewn the assignment was ratified or assented to by the company, or that the plaintiff ceased to have any interest in the moneys payable thereunder.

The defendant gave notice of exceptions to the count :

1st. That the amount of and duration of the policy are not shewn.

2nd. Because no negligence by defendant was shewn.

3rd. No reason was stated why such policy was bad, or that the defect was within the defendant's undertaking.

4th. That it appeared the defendant was agent of the company, and it was not alleged he was agent of the plaintiff, nor was there any reward or consideration averred for his undertaking; and if he acted as agent of the company, it was the company that was liable.

5th. That it was not averred the defendant's undertaking was to procure a policy valid in point of form—the breach is larger than the undertaking.

In last Term, *Burton*, Q. C., for the plaintiff. The plaintiff may be suing for the benefit of the assignee. Con. Stat. U. C., ch. 52, sec. 30. Besides the assignment not being ratified, it was not necessary to state any sum for which the insurance was effected. C. L. P. Act, sec. 76. It appears the defendant was the plaintiff's agent for the purpose alleged. *Elsee v. Gatward*, 5 T. R. 143; *Hart v. Miles*, 4 C. B. N. S. 371.

M. C. Cameron, Q. C., contra. The amount of insurance is material. *McGuffin v. Ryall*, 13 C. P. U. C. 115. It was

the defendant's duty towards the company to procure insurances; he was not in any way the plaintiff's agent. The 4th plea states a good defence. *Burton v. The Gore District Mutual Insurance Company*, 14 Q. B. U. C. 347; *Cahill v. Dawson*, 3 C. B. N. S. 106.

Burton, Q. C., in reply. The last case shews the count is good in form and in substance.

ADAM WILSON, J.—By sec. 30. of the Mutual Insurance Companies' Act above referred to, any policy effected becomes void on alienation by the insured of the property insured. But the company may agree to accept the alienee, in which case, if the policy is assigned to him, they may ratify it to him for his own use and benefit, and by such ratification the alienee shall be entitled to all the rights and privileges, &c., of the party who was originally insured.

These pleadings disclose a case not within the provisions of this section, for in this case the insured, the plaintiff, made no alienation of the property after making the insurance; all he did was to assign the policy to Graham, the person who had the mortgage upon the property before the insurance was effected. This is therefore the case of an ordinary assignment of a chose in action, which is not an invalid transaction, but it must be enforce in the assignor's name, which is done here—the plaintiff, therefore, may properly sue in this action.

It is then alleged that the defendant cannot be sued because there is no reward or consideration stated to be paid to him for his services. It is true an action is not sustainable against another for non-feasance unless a proper consideration is shewn to bind him in law for the performance of the work. But this count is for mis-feasance, in which, if a person gratuitously engage to do an act, and do it badly, he is responsible for his wrongful or negligent conduct. *Elsee v. Gatward*, before cited, is clear authority for this. This count states in positive terms that the defendant applied to the plaintiff to have the insurance effected; that the plaintiff thereupon, "at the special instance and request of the defendant," employed the defendant to effect it, and to procure the policy, and thereupon the defendant "undertook" to do so;

from which it is plain that a perfect promise was made by the defendant to effect this insurance and get the policy for the plaintiff, but it is a promise which the plaintiff could not have obliged the defendant to keep, because it was made without any consideration to constitute it a perfect bargain.

Although the plaintiff could not have compelled the defendant to fulfil this promise, that is no excuse for the defendant, when he does undertake to perform it, doing it badly and causing damage to the plaintiff by his negligence. He was not bound to act at all, but having acted, he was bound to act properly, and not having done so, he is liable for the consequences. I am therefore of opinion the defendant is liable.

It is next objected that no cause of action is stated, for that no negligence is shown. The statement is, "that although the defendant might have effected a good and valid insurance in accordance with his undertaking, yet he so carelessly, negligently and improperly effected the same that the pretended insurance was wholly void," and this undertaking is said to be as follows :—"To effect an insurance according to the regulations, rules, and conditions of the company, and to procure for the plaintiff the usual and customary policy of insurance from the company." Is the allegation "that the defendant so negligently and improperly effected the insurance that the same was wholly void," a breach of the undertaking that he would "effect an insurance according to the regulations, rules and conditions of the company?"

In *Cahill v. Dawson*, above referred to, the declaration alleged the promise of the defendant to be "to effect a good and available insurance," and the breach was "that he did not use due care, &c., in and about effecting the insurance, but carelessly and negligently omitted to effect any good or available insurance," following the very words of the promise, but in the present case an engagement to effect an insurance *according to the regulations of the company* cannot properly be said to be broken by the allegation that he "so negligently effected it that it was wholly void," for he did not engage to do more than to conform *to the regulations* of the company, and it does not appear he did not do this, and that the insurance may not have been void for some wholly different cause.

In Cahill v. Dawson the breach is to the effect that *no* insurance was effected—in this case it is that an insurance *was* effected, but that it was void. It should therefore have been shown how and in what respect it was void. More could not have been averred in Cahill v. Dawson—less could not have been averred in this—and as in pleading “the minimum of allegation is the maximum of proof,” the plaintiff would support his declaration by evidence of a far different character than he should properly give to charge this defendant upon the engagement set out.

If this objection had been taken after verdict, I incline to think it would have been cured, for it would be presumed to have been upon proof of this engagement that the damage had followed; but I am not prepared to say it is sufficient on demurrer even although the defendant has pleaded over. It appears to me like the case of the covenant “to repair a fence *except on the west side*,” and the breach was held insufficient, which only stated that the defendant did not repair, without showing that the want of repair was in other parts than on the west. Com. Dig. Pleader, c. 47; 1 Ch. on Plg., 6 Edn. 335. For the insuring, according to the regulations of the company, is an essential portion of the contract which ought to have been expressly negatived.

I think there is a proper cause of action shewn, but I think the breach of duty alleged is not a breach of that duty which the defendant engaged to perform.

The declaration is then objected to because the cause of action is not properly stated, for that it does not shew the amount of insurance to be effected, or its duration. These objections are not, I think, open to the defendant after pleading over, and are not, perhaps, objections at all. The case in 13 C. P. 115, is an authority with respect to the amount for a different object from the exception taken to the want of it in the present case. There is no complaint that the insurance effected was not for a sufficient sum, the complaint is that the duty was so badly performed that it was utterly valueless to the plaintiff. The case in 3 C. B. N. S. 106, states no amount for which the insurance there was to have been effected, although the duration of it appears there, for it was on the

voyage from Seville to Liverpool. Notwithstanding the absence of a sum for which the insurance was to have been made in the case in 3 C. B., it does appear to me to be a very insufficient allegation in law, that a person was employed to effect a valid insurance, which is all this count states, defining neither the amount of it nor its continuance. What would have been a good and valid insurance? Would it have been so if it had only been for \$50, or if only for three months? The case of *Turpin v. Bilton*, 5 M. & G. 455, contains all such particulars; but I do not think, upon the pleadings, the defendant can now take these objections.

I think the 4th plea altogether insufficient. The plaintiff, although he has assigned the policy, might still have sued upon it, if it had been a good policy, and he is now the only person to sue in respect of the damages he alleges he has sustained by the neglect to procure for him a valid policy.

Judgment therefore will be for the defendant for the insufficiency of the count.

Per cur.—Judgment for the defendant.

WILLIAMSON V. THE NIAGARA DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Insurance—Proof of loss—Giving of under oath—Statement of title—When necessary—Pleading.

Declaration on a policy of insurance granted by the defendants to the plaintiff, alleging loss, and notice, and as soon as possible thereafter, and within thirty days, the delivery of particulars, signed, and all the declarations made on oath, and an account verified by the oath of the plaintiff, and shewing no other insurance on the premises.

The 5th plea stated the condition by which the insured is required to give a particular account under oath, and to state whether and what other insurance existed upon the premises at the time of the fire, and that plaintiff although he had delivered his account, yet he had hitherto neglected to inform defendants whether any and what other insurance existed.

The 6th plea alleged that the property insured was incumbered by a mortgage, and that the plaintiff did not truly state his title to the land.

The plaintiff replied to the 5th plea that no other insurance was effected on the property insured, and to the 6th that the title to the land was not encumbered. Upon demurrer to these replications and exceptions to the pleas:

Held, that inasmuch as the defendants in the 5th plea did not complain of the plaintiff's not having made a declaration upon oath, but that he had neglected to inform them as to whether there was any other insurance, the traverse did not come within the condition of the policy and the 5th plea was bad.

Held, also, that the 6th plea was fully answered, the allegation of title of the insured being owner in fee of the land not being necessary, and the encumbrance being traversed.

The declaration was on a policy of the defendants granted to the plaintiff against risk or loss by fire. The declaration alleged the plaintiff, at the time of the insurance, and until the loss by fire, was owner of the premises insured. The loss was alleged in the usual way, and it was also alleged that he did forthwith, after the loss, give notice thereof to the defendants, and that he did, as soon thereafter as was possible, and within thirty days after the happening of the fire, deliver to the defendants a particular account in writing of his loss, signed with his own hand, stating the property, &c., *and did make all the declarations on oath required to be made, and which account was verified by the oath of the plaintiff, shewing also that no other insurance had been made on the said property*, and that although all matters and things which were or are a condition precedent to the rights of the plaintiff to recover from the defendants the amount of the insurance, had happened before the commencement of this suit, yet the defendants have not paid the loss.

The 5th and 6th pleas which are replied to, and the replications to which are demurred to, are in substance as follows :

The 5th plea states that by one of the conditions of the policy it was the plaintiff's duty to deliver, within thirty days after the loss, a particular account to the defendants of such loss, signed by his hand and verified by his oath, and also to declare on oath whether any, and what other insurance has been effected on the property insured. Yet the plaintiff, although he delivered to the defendants within thirty days, an account of his loss by fire, has hitherto wholly neglected to inform the defendants as to whether there was any further or other insurance on the premises, and the defendants are yet wholly ignorant as to whether there was any other insurance on the said premises.

The 6th plea states that the title of the plaintiff to the land and premises, upon which the said store or shoe shop, insured, stood, was encumbered by the mortgage referred to in the 2nd plea, and that the plaintiff did not truly state his title to the said land and premises on his said application for insurance, according to the statute, whereby the policy became void.

The replication to the 5th plea is, that no other insurance was

The replication to the 5th plea is, that no other insurance was ever effected on the property insured by the defendants ; and to the 6th plea is, that the title to the land was not encumbered by the said mortgage.

The defendants demur to the replication to the 5th plea, and they state as cause of demurrer, that the plaintiff admits that the declaration on oath of there being no other insurance, should have been made within thirty days, and was a condition precedent, yet he does not aver performance of it. The defendants also demur to the replication to the 6th plea, and state as cause of demurrer, that although the plaintiff denies the premises were encumbered by the said mortgage, he does not allege there was no other encumbrance thereon when he made his application for insurance, nor does he say that he did state his true title at the time of his application.

The plaintiff joined in demurrer, and gave notice of exceptions to the defendants' 5th and 6th pleas. That the 5th plea assumes it to have been the plaintiff's duty to make the declaration as to other insurances in any case, whereas such is only his duty if there is any other insurance effected. That the 6th plea does not state the encumbrance existed, when the application for insurance was made, or during the continuance of the policy. That the statute does not require the title to be stated when the applicant has a fee simple unencumbered. That the plea does not properly state whether it is the encumbrance by the mortgage that is complained of, or that the plaintiff did not state his title truly.

In this Term, *M. C. Cameron*, Q. C., for the defendants, referred to *Mason v. Harvey*, 8 Exch. 819 ; *Cameron v. The Monarch Insurance Company*, 7 C. P. U. C. 212, and *Cameron v. The Times and Beacon Insurance Company*, same vol. 234, in support of the 5th plea ; and the U. C. Con. Stat. ch. 52, sec. 27, in support of the 6th plea. Duplicitly being no objection.

Wood, contra, the plaintiff was not bound to state his title as he was tenant in fee, and the property was unencumbered. The allegation in the declaration, that he was owner, is sufficient averment of his title in fee, when the defendants have

pleaded over. The declaration shews the plaintiff made *all the declarations required to be made*. The plea does not properly traverse this, but asserts only that the plaintiff did not inform the defendants whether there was any other insurance.

ADAM WILSON, J.—The 5th plea is founded upon what is called, in the declaration, the 14th section of the act of incorporation; but neither that section nor the consolidation of it in section 68 of ch. 52, is at all like the condition endorsed upon the policy. The declaration states it as follows :

“All persons insured, and sustaining loss by fire, are forthwith to give notice thereof to the company, and within thirty days after such loss to deliver in a particular account of such loss, signed by their own hand and verified by their oath or affirmation, and by their books of account and other proper vouchers: they shall also declare on oath whether any, and what other insurance or encumbrance has been made on the same property. If there be any fraud or false swearing, the claimant shall forfeit all claim by virtue of his policy.” The plea then alleges that although the plaintiff duly delivered the particular account of his loss within the thirty days, “he has wholly neglected to inform the defendants as to whether there was any further or other insurance on the premises, and they are yet wholly ignorant as to whether there was any other insurance on the premises.”

The plaintiff, by his replication, declares “that no other insurance was ever effected on the premises.” The company, however, are not satisfied with *this* information, and probably they might fairly object to it at this stage of the proceedings, if so late a communication of it was to be at their expense, and was to cast upon them all the costs of the suit to obtain it when they should properly have had it before; but they rely on it as a bar in this action to the plaintiff’s right to recover anything for the loss which he has paid them fully for, to guarantee to him. In this case then of strict right, we must determine the sufficiency of the pleadings between the parties. The condition requires that the plaintiff shall declare on oath, whether any and what other insurance has been made on the same property. The plea alleges that the plaintiff has hitherto

wholly neglected to inform the defendants as to whether there was any further or other insurance on the premises, and the defendants are as yet wholly ignorant as to whether there was any other insurance on the premises. All therefore that the plaintiff had to do was to make this declaration on oath.

The defendants should have traversed "the making of this declaration," if they could safely have done so, instead of which they say the plaintiff *has neglected to inform them* as to whether there was any other insurance; but this he never engaged to do. He did engage to make a declaration on the subject, and this, it must be presumed, he did do, as it is not denied. It is the defendants' duty to inform themselves of what has been done, if they do not chose to do so, having the declaration before them, it is their own fault. The plea therefore may mean that the plaintiff has duly made his declaration, but they, the defendants, have never yet read it; or it may mean that the plaintiff has duly made the declaration, but has never yet delivered it to them; but this does not appear to have been his duty; or it may mean that the plaintiff has duly made his declaration but they, the defendants, insist it is not in proper form, or does not convey the necessary information; or it may mean that the plaintiff has duly made his declaration, but that he has not in addition to this informed them of the fact. In whichever way it is considered, the traverse tendered is unwarranted by the terms of the condition, and if the defendants be yet ignorant respecting such further assurance, if any has been made, the inference is that it is their own voluntary ignorance against which the plaintiff did not undertake to protect them.

We do not consider the replication to this plea sustainable in law. If the plea had been sufficient, it would have been no answer *now* to say there never was any other insurance made on the property. The condition required this fact to be made under oath, and necessarily before the commencement of the suit, and the assertion of it by way of replication, after suit begun, is clearly improper, beside the plaintiff was bound to declare not only what other insurance was effected on the premises, if any such insurance had been made, but he was bound to declare that no other insurance had been effected, if such were the fact.

The sixth plea assumes to state two facts, first, that the title of the plaintiff to the land, &c., on which the buildings insured stood, was encumbered by the mortgage referred to in the second plea, and secondly, that the plaintiff did not truly state his title to the land, &c., in his said application, according to the statute, whereby the policy became void, and the plaintiff traverses only the first, leaving the second unanswered. The plaintiff alleges that the plea contains but the one fact, and that it is to be read in this way, that the plaintiff's title was encumbered by the mortgage, and therefore he did not truly state his title to the land, as owner of it, as he states himself to have been in his declaration. If the latter part of the plea would have been bad, and insufficient or imperfect as an answer by itself, so that it requires the connection with the first part of it to make it perfect and complete, it may be that the plea may be so construed, as the plaintiff contends it should be.

The 27th section of the act provides: "If the assured has a title in fee simple, unencumbered, to the buildings insured, and to the land covered by the same, any policy of insurance issued thereon by the company, signed by the president and countersigned by the secretary, shall be deemed valid and binding on the company, but not otherwise: but if the assured has a less estate therein, or if the premises be encumbered, the policy shall be void, unless the true title of the assured and of the encumbrance on the premises be expressed therein and in the application therefor." This section, as I understand it, means that in all cases of insurance, when no estate is expressed, it shall be presumed that the assured has a title in fee simple, and if he assure as having such a title, whether he state so expressly or say nothing about it, from which therefore such a title is to be inferred, but have in fact a less estate, or if the premises be encumbered, then the policy shall be void. But if he have such lesser estate, or if the premises be encumbered, he must then state his true title, and the encumbrance on the premises, otherwise the policy shall be void. When therefore the assured has a fee simple unencumbered, he need state nothing whatever about his title or encumbrances, because it will be assumed he has the fee simple unencumbered,

but when he has a less estate, or if the premises be encumbered, he must state his true title and the encumbrances.

In this declaration the plaintiff alleges, "that at the time of the making of the policy, and thence continually, until and at the loss by fire, he was *the owner* of the said insured premises, &c." It also appears that the plaintiff had bound himself, *his heirs, executors and administrators*, to pay all assessments, and that he had paid \$84 to the defendants, being the amount of the deposit or premium for their insuring the sum of \$600 to the plaintiff, his heirs, executors, administrators and assigns, on the property mentioned and described by an application of the plaintiff in the possession of the defendants, and that the defendants covenanted to pay the plaintiff, his heirs, &c., all losses not exceeding, &c.

The allegation of his being *owner* may imply he is owner in fee simple. *Lister v. Lobley*, 7 A. & E. 124; per Littledale, J.; *Hughes v. Parker*, 8 M. & W. 244; *The King v. Kerrison*, 1 M. & S. 435; *Russell v. Shenton*, 3 Q. B. 449; *Doe dem Sheriff v. Coulthred*, 7 A. & E. 235. It is not necessary to allege an estate in fee, for it is not a condition precedent, and therefore it is a fact which ought properly to have come from the other side. Com. Dig. Pleader, C. 57. An allegation by him of his estate in his declaration would, very probably, have been premature. *Stephens on Pleading*; *Ricketts v. Loftus*, 14 Q. B. 492.

The allegation therefore in the plea, that the plaintiff did not truly state his title, appears to be of no moment, for the declaration does not state he ever did make any statement of his title; nor does it disclose a title in the plaintiff, which made it obligatory upon him, by the statute, to state his title respecting it. This part of the plea must therefore be utterly useless, or it must be read as qualifying the other portion of the plea, and as it may be so read, we think that it should be so understood as explaining or qualifying the allegation relating to the encumbrance said to have existed against the title, rather than it should be rejected as surplusage.

The plea then, so understood, is in effect an assertion that the plaintiff's title was encumbered by the mortgage, and being so encumbered, he did not state this fact truly in his

application according to the statute, and this, we think, is fully answered by the plaintiff's replication, that his title was not encumbered by the alleged mortgage.

Judgment will therefore be for the plaintiff, for the insufficiency of the 5th and 6th pleas.

Pur cur.—Judgment for the plaintiff.

HAMILTON V. WOODRUFF ET AL.

Executors—Devastavit—Fraud—Dower.

The defendants, as executors of Zimmerman, having given the Bank of Upper Canada, on the 28th of April, 1858, a confession of judgment for £217,637 9s., upon which judgment was entered; and the plaintiff in this action having recovered a judgment against the defendants, as executors of the same estate, for £4912 15s. 8d., on which execution had been issued against the goods and chattels, which were of Zimmerman in his life time, in the hands of the defendants, as executors, to be administered, which had been returned *nulla bona*, alleged a *devastavit*, to which the defendants pleaded that they had not eloiigned, wasted, &c., and

2ndly. On equitable grounds, that the judgment was by confession; that at the time of the giving of the confession, it was agreed that the confession and judgment, to be thereupon entered, should be no admission of assets in their hands; they then pleaded the judgment recovered by the Bank of Upper Canada (as in *Commercial Bank v. Woodruff et al.* 13 U. C. C. P. 621) and that they have fully administered, except £4000, which is not sufficient to satisfy the Bank of Upper Canada's judgment.

The plaintiff replied that the judgment of the Bank of Upper Canada was recovered by fraud and covin, and with intent to defraud plaintiff of his debt, and that they have not fully administered.

Held, that under the pleadings the plaintiff did not dispute the defendants' right to keep the £4000, to be applied on the Bank of Upper Canada judgment, but complained that the defendants have not otherwise fully administered. The complaint being the settlement of Mrs. Zimmerman's dower, which being decided in defendants' favour in the *Commercial Bank v. Woodruff*, 13 C. P. U. C. 621; this case is thereby disposed of and the defendants are entitled to judgment.

This differs from the case of the *Commercial Bank of Canada* against the same defendants, 13 U. C. C. P. 621, in this, that the other action was on two bills of exchange, this action is on a judgment for £4912 15s. 8d., recovered on the 5th day of November, 1858, in the Queen's Bench, on which execution had issued against the goods and chattels which were of Zimmerman in his life time, in the hands of the defendants as his executors, to be administered, which had been returned *nulla bona*, and averring a *devastavit*. To this defendants plead,

1st. That they have not eloiigned, wasted, &c., the said goods and chattels.

2nd. On equitable grounds, they say the said judgment was by confession; that at the time of giving of the confession it was agreed that the confession and judgment to be thereupon entered should be no admission of assets in their hands; that Zimmerman, in his life time, and the defendants as his executors after his death, were indebted to the Bank of Upper Canada in the sum of £217,637 9s., for which, on the 21st of April, 1858, the Bank of Upper Canada, in the Court of Queen's Bench, recovered a judgment against the defendants as executors as aforesaid, which is still in force, and they say they have fully administered except the sum of £4000, and that they had not at the commencement of this suit, nor at any time since, any goods, &c., except the goods, &c., of the value of the said £4000, which were not sufficient to satisfy the said judgment of the Bank of Upper Canada. The plaintiff replies, that the said judgment was obtained by fraud and covin, and with the intent to defraud the plaintiff of his debt, and that they have not fully administered, except the goods and chattels in the plea mentioned, as in the plea alleged.

The case was argued by *Adam Crooks*, Q. C., for the plaintiffs, referring to *Edwards v. Edwards*, 2 C. & M. 612; *Williams on Executors*, 1770, 1771, 1774, edition of 1856; *Campion v. Bentley*, 1 Esp. 344; *Gilbert v. Dee*, 1 Freeman, 537; *Cameron v. Stevenson*, 12 U. C. C. P. 389; *Wolverhampton v. Marston*, 7 H. & N. 148; *Synnot v. Simpson*, 5 H. of L. C. 130; *Siggers v. Evans*, 5 E. & B. 379; *Harland v. Binks*, 15 Q. B. 713.

M. C. Cameron, Q. C., and *McMichael*, for defendants, referred to *Alder v. Park*, 5 Dowl. 16; *Reeves v. Ward*, 2 Bing. N. C. 235; *Lyttleton v. Cross*, 3 B. & C. 322.

J. WILSON, J.—The judgment in the Commercial Bank case virtually disposes of this, and we should not have felt it necessary to allude to the pleadings, had it not been contended for on the argument that the plaintiff was entitled by these pleadings to recover £4000 against the defendants.

The confession of judgment was an admission of assets, but the defendants say, and the plaintiff does not deny it, that the

plaintiff agreed when the confession was given that it should be no admission of assets, otherwise *plene administravit* would have been no answer to *devastavit* in this action.

The defendants say, further, that before the recovery of the judgment on which this action was brought, the Bank of Upper Canada, on the 21st of April, 1858, had recovered a judgment against them for £217,637 9s., and that before the commencement of this suit, they had fully administered all the goods and chattels of Zimmerman, except £4000, which is not enough to pay what is yet due on the judgment of the Bank of Upper Canada. The plaintiff replies, that they have not fully administered the goods and chattels of Zimmerman, except the £4000 mentioned in the plea.

Now we understand these pleadings to mean that the plaintiff does not dispute the defendants' right to keep this £4000, to be applied in payment of the judgment of the Bank of Upper Canada, but he complains that the defendants have not otherwise fully administered as they allege. But the maladministration really complained of, was the matter of the payment to Mrs. Zimmerman for her release of dower, which the court has disposed of in the case of the Commercial Bank, in respect to which the evidence was the same in this case as in that. *Erving v. Peters*, 3 T. R. 685; *Rock v. Layton*, M. S. of Holt, 3 T. R. 690.

It is not necessary we should refer to the assets of the value of £4000, which the defendants admit they have in their hands, for the plaintiff has not denied their right to hold them as applicable to the judgment of the Bank of Upper Canada. The authority of *Waters v. Ogden*—Doug. 4 Edn. vol. 2, 452, warranted this. See *Hancock v. Prowd*, 1 Saunders by Williams, 334; but we fail to discover from the evidence that they had any assets in their hands.

The verdict will be entered for the defendants pursuant to the agreement at the trial.

Per cur.—Judgment for defendants.

LOW (DEMANDANT) V. SPARKS ET AL. (TENANTS).

Dower—Action for—Estate of tenant.

Held, that the defendants, executors, under the will of N. S. devising "all and every the messuages and tenements whatsoever, whereof or wherein I have or am entitled to any estate of freehold or inheritance, by virtue of any mortgage or mortgages, unto and to the use of my executors (the defendants) to the intent, &c.," took such an estate in the land in question as to make them liable in an action for dower.

SPECIAL CASE.

Action for dower, by the demandant, against the defendants as tenants of a lot of land situate in the City of Ottawa, to which the defendants pleaded that they were unable to grant same, because they were not, at the commencement of this action, nor has either of them ever been the tenants or tenant thereof as of freehold.

The action was brought against the defendants, Nicholas, Sparks and James D. Slater, as the executors of the will of Nicholas Sparks, deceased, who in his life time was seized of the lot in question, under and by virtue of an indenture of mortgage made by one John Hervey to him, subject to the right of the demandant's dower therein. The following was the clause in the will of the said Nicholas Sparks, under which the demandant contended the defendants took such an estate in the land in question as made them liable in this action :

"I do hereby give and devise all and every, the messuage or tenements, lands and premises and hereditaments whatsoever, whereof or wherein I have or am entitled to any estate of freehold or inheritance, by virtue of any mortgage or mortgages, unto and to the use of my executors hereinafter named, and the survivor of them, and the heirs and assigns of such survivor, to the end and intent that they may release and convey the same upon payment of the principal sums and interest, thereby respectively secured, but the money secured on such mortgages to be considered as part of my personal estate."

C. S. Patterson, for plaintiff, referred to Jarmin on Wills, p. 268, last edition.

S. Richards, Q. C., for defendants, referred to Jarmin on Wills, pp. 665-668; Walker v. Boulton, 6 O. S. 553, referred to in Draper on Dower, p. 70; Ham v. Ham, 14 Q. B. U. C. 497.

J. WILSON, J.—The only question made by the parties in this case is, whether “the tenants take, under the will of the late Mr. Sparks, such an estate in his land as to make them liable in this action.” In *Doe dem. Guest v. Bennett*, 6 Exch. 892, the clause in the will of Thomas Hayes was, “I also leave my wife, Rebecca Hayes, to receive all moneys upon mortgages, and on notes out at interest; and at my wife’s decease, I leave my niece, Mary Brampton, to bury my wife decently, and to pay all my wife’s debts, and to take all that remains of my property, land or personal property.” *Park, B.*, in the judgment of the court, said, we are all of opinion that the words “to receive all moneys upon mortgage,” were sufficient to pass not only the money on mortgages, but the securities also, that is the legal estate upon which the money is secured.”

In this case the words more strongly import the testator’s intention to vest the legal estate in the defendants. On the authority of *Cumming v. Alguire*, 12 U. C. Q. B. 330, the testator Sparks would have been liable to render the demandant her dower in the lands; and we all agree, that he devised the legal estate in it to the defendants, who are therefore liable in this action.

Per cur.—Judgment for plaintiff.

COUSE V. HANNAN ET AL.

Road Company—Notice by to municipality—16 Vic. ch. 190, sec. 3—Tolls.

Held, that the clause in the stat. 16 Vic., ch. 190, sec. 3, that “no company formed under this Act shall commence any work until thirty days after the directors have served a written notice upon the head of the municipality, in the jurisdiction of which such road or other work connected therewith is intended to pass or to be constructed,” &c., is directory and not compulsory; and in this action against a road company by plaintiff, for compelling plaintiff to pay toll on their line of road—On demurrer, *held*, that the defendants were not obliged to plead the giving of notice directed by the statute, but that plaintiff was obliged to reply the same if he wished to dispute the right of defendants to compel the payment of toll.

In the first count of the declaration the plaintiff complained, that the defendants wrongfully erected a gate and toll house on the Talbot road, in the county of Elgin, and stopped the plaintiff, who was a farmer driving his team of two horses, with a waggon load of grain, along the said road to St.

Thomas, and wrongfully exacted from and compelled him to pay 7½d. as toll before they would permit him to proceed on his journey, and wrongfully detained him and his team until he paid the said sum, which he paid under protest, and he claims damages for this wrong and injury. The second count is the usual money counts in which the words "money payable, &c.," as in schedule "B." C. L. P. A. are omitted.

1st. The defendants pleaded not guilty.

2nd. And for a second plea say, that certain persons, not less than five in number, residing in the county of Elgin, duly formed themselves into a company for the purpose of constructing a gravel road, on the Talbot road mentioned in the declaration, from St. Thomas to Aylmer, a distance of twelve miles, and having duly complied with all the requirements of the statute in that behalf, on the 25th of May, 1859, became a duly chartered and incorporated company, bearing the name of "The St. Thomas and Aylmer Gravel Road Company," and that afterwards the said company did, within the time by law limited, proceed to construct, and did construct and finish five miles of the said road; that on the 14th day of July, 1860, the said company erected a toll gate on the portion of road so constructed and finished, and did fix and regulate the tolls to be paid by persons passing and repassing the said gate with horses, carriages, &c.; that the amount so fixed for passing the said gate with every vehicle drawn by two horses was 3½d.; that the plaintiff not being a person exempt from paying toll, on the 6th of September, 1863, having passed along with a vehicle drawn by two horses, and used the said road for five miles, was subject to and liable to the payment of 3½d. for toll; that the said defendant Hannan, was the toll gate keeper, and the other defendant president of the said company; that Hannan was duly appointed to collect toll there, and when the plaintiff with his vehicle drawn by two horses was in the act of passing the said gate, demanded from the plaintiff 3½d. for toll; that the plaintiff, after such demand, refused to pay the said toll, and thereupon the said defendant Hannan, as gate keeper, with the sanction and command of the defendant Jackson, as president of the company, seized and distrained the said vehicle, &c., for non-payment of the

toll, and kept them for five minutes, and until the plaintiff paid the said toll so demanded, which is the stopping, &c., in the first count of the declaration mentioned.

To this plea the plaintiff demurred, and said for cause that it did not allege that the directors of the alleged company served such notice upon the head of the municipality, in the jurisdiction of which such road is constructed, as was required by section 3 of the 16 Vic., ch. 190.

The defendant Hannan joined in demurrer. He excepted to the plaintiff's declaration on the following grounds :

That the first count of the said declaration was ambiguous and uncertain, in as much as it alleged therein as a ground of action against the defendants, "that the plaintiff paid and wrongfully exacted from himself a large sum of money, &c., which the plaintiff was compelled to pay and did pay "to himself, under protest, before the defendants would permit him to continue his journey, &c., and the plaintiff complains that he had thereby sustained great damages, besides the money so wrongfully extorted, &c., by himself."

2nd. That the words "money payable" do not precede either of the two last counts in the said declaration, as required by the "Common Law Procedure Act."

3rd. That it is not alleged in the said declaration that the amount sought to be recovered under the said last counts of the declaration, or either of them, was due or payable at the commencement of this action.

Abbott, for the plaintiff, contended, that the giving notice to the municipality, as required by the 3rd section of 16 Vic., ch. 190, was a condition precedent, the performance of which the defendants were bound to allege, and without which they had no right to construct the road. He cited *Con. Stat. of U. C.*, ch. 49, sections 2, 3, 10, 13, 60, 71. The Attorney-General on the relation of the Municipality of the Township of Nepean v. The Bytown and Nepean Road Company, 2 Grant's Chy. Rep. 626; *Johnston v. Boyle*, 8 U. C. Q. B. 142; *Nelson, &c., Road Company v. Bates*, 12 U. C. Q. B. 599.

R. A. Harrison, contra, contended that the 1st count was bad in the respect mentioned in the objection, but he was

stopped by the court, it appearing a clerical error in one or more of the demurrer books, and the objection was not sustained. And he contended that the omission of the words "money payable" was fatal in the last counts when the defendants are charged with money had and received, &c. *Place v. Potts et al.*, 8 Exch. 705; C. L. P. A. ch. 22, schedule B. page 269. As to the 2nd plea, he contended that the giving the notice is directory, not imperative or compulsory. *Morgan v. Parry*, 17 C. B. 334; *Powis v. Harding*, 1 C. B. N. S. 532; *Dossett v. Harding*, 1 C. B. N. S. 524; *Chambers v. Griffith*, 1 Esp. 148. That the recognition of the company, as such, is enough to entitle them to exercise their right. *Paris and Dundas Road Company v. Weekes et al.* 11 U. C. Q. B. 56; 16 Vic. ch. 190, secs. 2, 5, 4, 27, 28, 31, 42, and that the plaintiff was bound to supply the want of notice to the municipality. *Lynch v. Wilson*, 22 U. C. Q. B. 226-30.

Abbott, in reply, insisted that the defendants could not object to a pleading to which the demurrer had no reference; that the second count ought not to have been inserted in the paper books.

J. WILSON, J.—The plea demurred to is to the first count, but the remaining objections to the declaration is to the second count, which ought not to have appeared in the paper book. The objection to the first count arose from a clerical error in some of the copies. The original declaration was right, and this point was disposed of at the argument. The only question raised on this demurrer is, whether the defendants, who justify their right to exact tolls, under this company, are bound to allege that the company served notice upon the head of the municipality in which the road is situated, of its intended operations as a corporation, as required by the 3rd sec. of the 16 Vic., ch. 190. The words are, "no company to be formed under the provisions of this Act, shall commence any work until thirty days after the directors shall have served a written notice upon the head of the municipality in the jurisdiction of which such road, or other work, shall be intended to pass or to be constructed, in, &c."

The company was formed on the 25th of May, 1859, and

had constructed five miles of the road before the 14th of July, 1860, when they imposed tolls according to the statute, and it has continued to maintain the road and levy tolls ever since.

The plaintiff, by this demurrer, endeavours to raise the question whether this company ever had the right to construct this road. He does not question the legality of the formation of the company, but he says in fact, "you do not show me that you ever gave the municipality notice that you were going to commence to make this road, and although you have made it and maintained it, and I have travelled over it, I am not bound to pay you toll."

The notice referred to seems intended for the sole purpose of giving the municipality the opportunity "of passing a by-law within the thirty days, prohibiting, varying or altering any such intended line of road," for if no such by-law is passed, then "the company may proceed in the construction of the road without being liable to any interruption or opposition from any source whatever." No right is given, under any circumstances, for any person, other than the municipality, to object to the construction of the road. To what the plaintiff says, the company might reasonably answer, "you have no right to raise this objection, for you were not entitled to notice, and you could not have prohibited the making of the road." The notice, for ought we know here, may have been given, and the legal presumption under the facts alleged in this plea is that all has been done by the company that the law required to be done in regard to the construction of the road, and that if this want of notice was material, it should have been replied, instead of being urged as cause of demurrer. The plaintiff says, "you ought to have averred the company gave this notice, and as you have not done so they did not give it." Admit it so, for the purpose of disposing of this question. Then was the giving of the notice directory, or imperative and compulsory, so that the construction of the road and all that the company has done are to be lost in case the notice was not given. The distinction between what is directory and what compulsory and imperative seems to be this—that where it is declared a thing shall be done, without declaring or implying that its omission shall make the thing

subsequently done void, then it is directory; but where the intention of the legislature is expressed or implied, that an omission of what is declared shall be done, or any thing done contrary to it or, without it, is done, shall make the thing null and void, then it is compulsory and imperative. *Rex v. Sparrow*, 2 Stra. 1123: *Rex v. Gravesend*, 3 B. & Ad. 240; *The Queen v. The Inhabitants of Fordham*, 11 A. & E. 73; *The King v. The Justices of Leicester*, 7 B. & C. 6; *The King v. Inhabitants of Birmingham*, 8 B. & C. 29; *Regina v. Sneyd*, 9 Dowl. P. C. 1001. The case of *Morgan v. Parry*, 17 C. B. 334, was an appeal from the decision of the revising barrister for the borough of Cardigan, who held that he could not receive a voters' list under the 6 & 7 Vic. ch. 18, which had been made out and delivered to him, but not signed by the overseers as required by the statute. By the 13 sec. of that Act, it was enacted, that in cities and boroughs the overseers of every parish or township shall, on or before the last day of July, in every year, make out an alphabetical list of all persons entitled to vote, and *shall sign* such lists and shall publish copies of such lists on or before the 1st day of August in each year. *Jervis*, C. J., said, "It appears to us that in this particular the words of the Act are to be considered as directory only, and that the revising barrister ought to have treated the *unsigned* list as valid."

On the reason of the case, as well as on the authority of these cases, we think the defendants were not bound to allege the giving of the notice, mentioned in the 3rd sec. of the 16 Vic. ch. 190, and that the giving of the notice is directory not compulsory.

Per cur.—Judgment for the defendant on demurrer.

During this Term the following gentlemen were called to the bar :

JOHN ALEXANDER BOYD, EDWARD BAYNES REED, JAMES PHILIP GILDERSLEEVE, DUNCAN DOUGALL, MARK SCANLON, JOHN HENRY DUMBLE, FREDERICK WILLIAM MACDONALD, JAMES PETER WOODS, CALVIN BROWN.

HILARY TERM, 27 VIC. (1864).

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

THE QUEEN V. CHUBBS.

Rape—Evidence—Affidavits not received on motion for a new trial.

Upon motion for a new trial under Con. Stat. of U. C. ch. 112, on behalf of a prisoner who had been convicted of rape, the weight to be attached to the evidence upon which the conviction was found being entirely a question for the decision of a jury, the court in its discretion refused a new trial, although not entirely satisfied with the finding of the jury on the facts proved.

Held, also, that affidavits of facts which were not shewn to have become known since the trial, were not admissible on a motion for a new trial.

The prisoner was tried and convicted at the last Wentworth assizes, before the Chief Justice of this court, upon a charge of rape committed upon Mary Ann Catharine Hurd.

In the last term, *O'Reilly*, Q.C., on behalf of the prisoner, applied for a new trial under the statute, on the following grounds :

1. That the verdict was contrary to the evidence, or the weight of evidence.

2. That it was rendered on insufficient evidence.

3. That it was contrary to the judge's charge.

4. On the ground of surprise, for that the statement of the principal witness (Mary Anne Catharine Hurd), in her evidence, to the effect that one Duffy and his wife, near to whose house she stated the alleged offence was committed, were not at the time of the offence at home, and that she had shortly or immediately previously thereto met the said Duffy and his wife in the city of Hamilton, is untrue ; for that the said Duffy and his wife were at home, at the time referred to ; and that the said Mary Anne Catharine Hurd had not so met them immediately or shortly previous thereto, as she alleged.

5. Because the said Mary Anne Catharine Hurd is known by affidavits filed to be a person on whose evidence it would not be proper or safe to rest a conviction ; and because she stated many facts and circumstances on the trial contrary to the truth, as shown by the affidavits filed.

S. Richards, Q. C., for the Crown, shewed cause.

Affidavits cannot be used in such a case under the statute ; The Queen v. Crozier, 17 Q. B. U. C. 275 ; The Queen v. Oxentine, 17 Q. B. U. C. 295 ; The Queen v. Fitzgerald, 20 Q. B. U. C. 546 ; to the case of The Queen v. Grey, decided on appeal, and referred to in the case against Fitzgerald and to The Queen v. Beckwith, 8 C. P. U. C. 274 ; and to the statute U. C. Consol. Act, c. 112.

The evidence shows the jury were perfectly justified in finding the verdict they did.

The evidence to impeach the complainant's character could have been obtained at the trial, as her character was then as well known as it is now, and it was well known she must be examined as a witness.

So also as to the alleged surprise. She had stated those facts before the trial, and the prisoner should have been prepared to meet them. It was entirely a question for the jury, and their finding should be final.

O'Reilly, Q. C., in support of the rule. New trials have been granted in the United States on a review of the evidence given at the trial.

The State v. Hopkins, 1 Bay's Rep. 372 ; and in England also, in The King v. Gough, Dougl. 791 ; Rex v. Read, 1 Lev. 9 ; Rex v. Smith, Jones' Reports, 163 ; and in the late case of The Queen v. Scaife, 17 Q. B. 238 ; The Queen v. Jones, 4 L. T. N. S. 154 ; The Queen v. Fletcher, 8 Cox, 131, and 5 Jur. N. S. 179.

Our own statute ought to be construed so as to permit of a new trial being granted in other cases than on mere questions of law ; and this will be practically defeated in many cases, if affidavits are excluded. And as to the evidence itself, the court will see that the verdict ought not to have been against the prisoner.

J. WILSON, J.—A new trial has been moved for, on the grounds mentioned in the rule. The learned Chief Justice of this court, who presided at the trial, suggested all the considerations which were proper to be considered in his charge to the jury. No complaint in this respect has been made. The evidence against the prisoner was direct and positive. It was solely the province of the jury to judge how far under all the circumstances the prosecutrix was worthy of credit. On reading the evidence, I cannot say that I should have been surprised at an acquittal, or dissatisfied with it; nor can I say, assuming the prosecutrix has told the truth, that the conviction is against evidence, or in any way wrong.

In passing the act, giving the right to the accused to move for, and the court to grant, a new trial; I do not see that it was intended to give courts the power to say that a verdict is wrong, because the jury arrived at conclusions which there was evidence to warrant, although from the same state of facts, other and different conclusions might fairly have been drawn, and a contrary verdict honestly given.

Assuming that affidavits are admissible on applications of this kind, which has not yet been determined in this court, nor does this question necessarily now arise, I think they disclose nothing which would induce a court in a civil action to grant a new trial as a matter of right. It is all important that the administration of criminal justice should be prompt, and, unless for causes which are apparent and sound, there should be no protracted discussion after the guilt of the accused has been established by the verdict of a jury. I think, therefore, the rule should be discharged.

A. WILSON, J.—It cannot be said that any one of the matters stated in the affidavits was unknown to the prisoner at the time of his trial; and it is very probable he could have procured witnesses to have given testimony as to all of them if he had desired to do so. The prisoner himself does not say he was ignorant of any one of them, nor does he say he could not have given evidence of them. He says it is true he was ignorant that Taylor knew of the singing of the indecent songs, and of the prosecutrix raising her clothes in the man-

ner represented. But this can be no reason for his not having interrogated the prosecutrix with respect to these matters at the trial, when she might have admitted the truth of them, or might have afforded an explanation of them if they be true. And it is not to be presumed, if the fact be as the prisoner states it to be, that the prosecutrix would not have stated the truth if she had been interrogated with respect to them. But it is going altogether too far to permit any one, whether in a civil or criminal case, to forbear from fully pressing any portion of his examination material to his case, merely because he may not happen to know every person who does happen to have a knowledge of the facts. His own imperfect information is no excuse for his not using the facts which he does know to the full extent of his information. The purpose of an examination is not merely to procure the narrative of facts which may be agreeable to the witness, and which he may be willing to relate; it is also to enforce the truth from him of facts which he may be anxious to conceal or unwilling to communicate. And it should be so conducted as to get the truth out, of those facts which the party knows the witness can relate: and further even than this, it is to discover from the witness whether he does or does not know something more than he chooses to tell, or relating to matters which it may only be suspected he has a knowledge of.

I cannot say the prisoner has attempted to examine the prosecutrix upon some of those facts which he did know she could speak to, if he had interrogated her; nor can I say that he might not have procured all the testimony that he has set forth without any kind of difficulty, if he had attempted or desired it. His case is, therefore, not one which can be entertained or encouraged in any manner, even if we could receive and act upon the affidavits which he has filed. Much of the argument of the case was upon the admissibility of affidavits under the statute, and several decisions of our courts have been referred to and relied upon as settling that affidavits cannot be received: that the application for a new trial must be decided upon what took place *at the trial*, either as a question of law or of fact, and upon nothing else than that which did appear at the trial.

The Queen v. Beckwith, 8 C. P. 274, was the first decision, and in that case the Chief Justice who delivered the judgment of the court said—"I have great doubts whether we should receive affidavits on a motion for a new trial under this statute * * * But the strong leaning of my opinion is that, under the words of the statute, affidavits are not admissible at all. We do not, however, decide this point."

The next case is Regina v. Crozier, 17 Q. B. 275, where an affidavit of a witness that he misapprehended a question put to him, which led to his answer producing a wrong impression, was filed, the Chief Justice said—"As to the affidavit, we could not take it as a ground of moving under the statute, for the motion is merely on the evidence, and the act opens no other ground."

The case of Regina v. Oxentine, in the same vol. fo. 295, decided that "an application on affidavits setting forth the discovery of new evidence, or the misconduct of the jury, cannot be entertained, for these are not points of law * * and they are not questions of fact which we understand to mean questions of fact arising from or suggested by the evidence given."

The case of Regina v. Fitzgerald, 20 Q. B. 546, was not a decision of the question, for it was merely a review of an alleged irregularity of a court of quarter sessions, in granting a new trial upon an affidavit produced. The *decision* is that "it is *only surmised* the court of quarter sessions did not follow the rule established in the superior courts, of not granting new trials in criminal cases upon affidavits merely." But the court no doubt states very explicitly that the reception of affidavits is "contrary to the decisions of this court, and also of the Common Pleas." And the case of The Queen v. Grey, in appeal, is referred to as a conclusive decision upon the point. In that case the motion was made upon affidavits of the absence of the prisoner's witnesses; the court of Common Pleas refused a rule *nisi* on the affidavits filed. The case was then carried into appeal, and judgment was pronounced by the late Sir John Robinson, that affidavits were not admissible under the statute. The Chief Justice said—"Both of the common law courts have considered that the statute does not admit of new trials

being granted upon affidavits setting forth the discovery of new evidence since the trial, or on the ground that the defendant was unable from some cause to procure the testimony of certain witnesses."

"By statute 20 Vic. ch. 61, s. 1, a defendant in any criminal case, convicted at the assizes, may apply for a new trial, to either of the superior courts of common law, upon any point of law or question of fact, in as full and ample a manner as any person may apply to such superior courts for a new trial in a civil action.

Sec. 4 gives an appeal to the Court of Error and Appeal in case such conviction shall be affirmed by the court of common law which has been applied to for a new trial; and it is provided that "such court of Error and Appeal shall and may make such rule or order thereon, either in affirmance of such conviction, or for granting a new trial, or otherwise, as the justice of the case may require, and shall further make all other necessary rules and orders for carrying such rule or order into effect."

The last recited words, that the superior court may make such rule or order therein when in affirmance of the conviction, or for granting a new trial or otherwise, as the justice of the case may require," are certainly very comprehensive; but they must be taken in connection with the object of the application which the statute allows to be entertained by the court appealed from, and that is "an application for a new trial upon any point of law or question of fact."

Both of the common law courts have considered that the statute does not admit of new trials being granted upon affidavits setting forth the discovery of new evidence since the trial; or on the ground that the defendant was unable from some cause to procure the testimony of certain witnesses. For the grounds of that opinion I refer to the judgment given in the Common Pleas, which is appealed from in this case, and to the cases in the Queen's Bench, *U. C.*, of *Reg. v. Crozier*, 17 *U. C. Q. B.* 275; and *Regina v. Oxentine*, 17 *U. C. Rep.* 295; and the case in Common Pleas of *Regina v. Beckwith*, 8 *U. C. C. P.* 274.

My judgment is in accordance with the opinions expressed

by the court in these cases. In criminal cases, as in civil, it rests with the judge at the trial to determine questions of law, and with the jury to determine questions of fact, though in some cases it is thrown upon the jury to determine a mixed question of law and fact.

The judgment that has been given upon any "point of law or question of fact," when it has resulted in the conviction of the defendant, is made by the statute subject to an appeal to either of the superior courts of common law, by way of motion for a new trial, but not, I think, on any ground, apart from what was done by either the court or the jury at the trial, such as the alleged discovery of new evidence, or a disappointment in obtaining witnesses.

My brothers will say whether they take the same view of the statute. We all, I think, agree in the opinion that if we could grant a new trial upon grounds of such a nature as are disclosed in this case, we should certainly not think that a sufficient case of that kind is made out in the affidavits which were before the court of Common Pleas, and that in a civil case no court would be warranted in disturbing the verdict upon such statements.

If these cases be reviewed it will be seen that Beckwith's case is a studious avoidance of a decision as to the reception of affidavits. The case of Crozier, that the witness *misapprehended* a question, which led to his answer *producing a wrong impression*, is such a ground as could not have been listened to in any case whatever, and what is said by the court is not very definite. The case of Oxentine is expressly grounded on cases setting forth the discovery of new evidence, or the misconduct of the jury. The case of Fitzgerald is not a decision at all of the question. The case of Grey, however, does proceed further, for the Chief Justice said he did not think a motion for a new trial "could be made on any ground apart from what was done by either the Court or the jury at the trial, such as for the alleged discovery of new evidence or the disappointment in obtaining witnesses;" and that his brothers "will say whether they take the same view of the statute."

It cannot be said there is anything perfectly conclusive on

so important a question; although it does appear the opinion of the learned judges whose *dicta* have been referred to, show that they entertain a very strong conviction that affidavits cannot be received in such a case. It may be that this is the proper view of the law; but unless it has been already so decided I do not feel called upon to say whether I subscribe to that view or not. I see the gravest difficulties in the way of throwing every criminal case in the country before the judges to be tried by them on affidavits instead of by a jury, and of casting upon the judges the duties and responsibilities which appertain solely to the jury. It may not be that injustice to the accused which it is to the judges, for it affords him a double trial, while it imposes a new, invidious and questionable burden upon the judges, entirely foreign to their true and legitimate functions.

On the other hand, I can imagine cases in which it might be a very great injustice to refuse affidavits of facts which might not have been known to the prisoner at the trial, and which prove beyond all question and by universal admission his perfect innocence of the charge of guilt which has been recorded against him. The person said to have been murdered may afterwards appear in court in actual life. The money said to have been stolen may afterwards be found by the prosecutor in his own possession. The real culprit may afterwards be discovered, and other cases of the like kind might happen. And to exclude a new trial in such cases upon affidavit might not be quite consistent either with the present law, or with the spirit which no doubt dictated it (see Foster Crown Law, 367).

Some medium course (if the question be still open) may be found by which every case may not be tried a second time by affidavits, and by which, in proper cases, that just relief may be administered which it would seem the accused may very often be entitled to. I am quite clear, however, that these affidavits, for reasons already given, should not be received, and could not properly be acted upon in any case. As to the questions of fact, appearing at the trial, we cannot say the evidence does not fully sustain the very grave charge against the prisoner, and it is impossible not to see that the learned

Chief Justice submitted the case fairly to the jury, and very favourably for the prisoner. I may say the evidence does not impress me with the same force which it did the jury, and that I might not have arrived at the same result which they did; but they were spectators and auditors of the accuser and of the accused, and of all that was done and said upon that trial, while we take our impressions at second hand, and under many disadvantages, which render us less qualified to arrive at as correct a conclusion as the jury, who were the actual triers, have done. I am not prepared to say the jury have done wrong, nor can I say that there is not abundant evidence to justify their verdict, and unless I can say this, I am not compelled to assume their place and the responsibility which is cast upon them by law, and to reverse their finding. It is their duty to determine what their verdict shall be, not mine, and when it is rendered it is their verdict, not mine; and if it stand it must stand as their verdict, not as mine, unless I can declare that their verdict is plainly and manifestly wrong, and this I cannot do upon this occasion.

It has been well said by a very accomplished and able judge, Lord Justice Sir *J. L. Knight Bruce*, in the Attorney General v. The Corporation of Beverly, 1 Jur. N. S. 764—"I think it beyond a question that it is generally the duty of an appellate judge to leave undisturbed a decision of which he does not clearly disapprove. I conceive that in our court, as in the civil law, it is the rule that 'gravely to doubt is to affirm.' Considering that the judge appealed from is frequently as qualified to form an opinion as he that is appealed to, and remembering in how many cases the opinions both of original and appellate courts are, upon a fresh consideration, found to be mistaken, I hold that a reversal cannot proceed from a judge fit for his office, without a full conviction of the error of the judgment which he is reviewing, and it is upon this principle I express my opinion."

The question in this case, therefore, must rest with the executive, and not with the judicial authority, and there can be no doubt that the prerogative will, in every case, be justly administered. My opinion is that this rule must be discharged.

RICHARDS, C. J.—As the prisoner was tried before me, I preferred that my learned brothers should consider the case and make up their minds before I expressed my final conclusions on the points raised. I quite concur with them in the views they have expressed, that we cannot properly interfere either on the ground stated in the affidavits, if they could be received, or upon the ground that the verdict was contrary to evidence or the weight of evidence, or to the judge's charge, and I have very little to add to their able and exhaustive judgments.

There is a very grave responsibility cast upon the courts by the act allowing new trials in criminal cases, and in giving force to the enactments of the legislature on this subject, we cannot avoid considering the effect that it will have on the administration of justice, recklessly to throw open our courts to constant applications for new trials in criminal cases. In almost all cases new trials are a great evil, they create doubt and uncertainty as to the decisions of courts and juries; in civil cases they encourage a further prosecution of litigation, often to the ruin of both parties, and in criminal cases they prevent that prompt punishment of offences which is so necessary to prevent crime. In criminal cases, as it has been well observed, the new trial will often be less effectively conducted and looked after than in civil cases, from the want of that direct personal interest in the success of the prosecution which necessarily obtains in a civil suit, the public interests in these cases then are most likely to suffer.

In a recent case in the divorce court in England, *Wilde, J. O.*, stated the principles which would guide that court in the use of the power of granting new trials, and as these principles are those which are admitted and acted upon in all the common law courts in England, in civil cases, I will transcribe some of his observations here as the latest exposition of the law I have met with on that subject. The learned judge, after referring to the difficulty frequently occurring in cases before that court, of pronouncing on the materials before the jury, that they had done wrong, and observing that that was what the court must be enabled to do, before it could justify an interference with the verdict which a jury had

found, remarks that, "new trials are in themselves an enormous evil, though there are cases in which justice demands them. No element in the administration of justice is so destructive of its efficiency as uncertainty, and no grievance more sorely felt by suitors than that which snatches success away at the moment of its accomplishment, and sets all abroad and in doubt again after one complete hearing and decision. Nothing shakes so much that confidence in the law which it is the first duty of all tribunals to uphold. The court does not exercise the function of mere appeal from the jury. It is not its duty to go over the same ground with them, and reverse their decision, merely because it arrives at an opposite conclusion; it must see its way very plainly, and be satisfied with tolerable certainty that there has been error or miscarriage, failing that, it is bound to accept the verdict as correct."

In the State of Tennessee new trials are granted in criminal cases, and from the case of *Kirby v. The State*, 3 *Humph. Reports*, p. 289, I make the following short but pertinent extract:—"The jury are the exclusive judges of the credit of the witnesses, and in all cases much must occur before the court and jury properly calculated to act upon their minds, which cannot be transferred to paper; a verdict must therefore, in all cases, have great weight with the court." In *Walton v. Land*, 9 *Jurist*, 972, a new trial was refused which was applied for, on the ground that the statement of the witness was not entitled to credit. The head note of the case, which seems warranted by the report, is as follows:—"If a verdict be contrary to the weight of evidence, a new trial may be granted, whether the case was tried before a sheriff or a judge, but in either case it must appear that the jury were palpably mistaken, and it cannot be inferred that they were so if the case has been left to them entirely on the credibility of the witnesses."

The often quoted observations of Sir *Nicholas Tindal*, in *Mellin v. Taylor*, 3 *Bing. N. C.* 109, may be repeated here: "We agree that in every case in which a verdict has turned upon a question of fact, which has been submitted to a jury, and there is no objection to the verdict, except that it is found in the opinion of the court against the weight of evidence,

the court ought to exercise not merely a cautious but a strict and sure judgment, before they send the case to a second jury. The general rule under such circumstances is, that the verdict once found shall stand, the setting it aside is the exception, and ought to be an exception of rare and almost singular recurrence."

We find in many of the cases in the reports language similar to that used by *Jervis*, C. J., in *Hawkins v. Alder*, 18 C. B. 640.—"Although I must confess that if I had been on the jury I should have found the other way, I think there ought to be no rule. The jury did not take the same view that I did; but I cannot say they were so entirely wrong as to feel justified in taking the matter out of their hands. There was some evidence on both sides." I append the observations of one of the judges of the Supreme Court of the State of New York, as to new trials in criminal cases, as shewing the views of an able lawyer resident in a country where in many of the states new trials in criminal cases are very often granted, and a resident of a state where new trials were frequently ordered in such cases on bills of exceptions taken to the ruling of the judges on the trial.*

* In *The People v. The Judges of the Dutchess Oyer and Terminer* (2 Berber's Supreme Court Reports, 282), on 21st September, 1847, *Strong*, presiding judge, made the following observations:—"There are several reasons why the power to grant new trials on the merits should exist in civil rather than in criminal cases. In civil actions verdicts are rendered for either party when a reasonable satisfaction as to the truth is produced on the minds of the jury. The scales of justice are equal; the plaintiff, as well as the defendant, has a right to move for a new trial; as the controversy generally relates to property only, promptness of decision is not generally absolutely essential to effect the ends of justice. And in cases where the verdicts are against the weight of evidence, if a new trial could not be had for that cause, the unsuccessful party would be remediless, as the appellate courts can only review decisions on points of law. But in criminal cases the accused cannot be convicted where there is a reasonable doubt, however strong the weight or decided preponderance of the evidence may be against him. The presumption at the outset is in favour of his innocence, the court are his counsel, and, in the benign manner of administering our laws, all doubtful questions of law and fact are decided in his favour. Hence there are few convictions against the weight of evidence. * * * In criminal cases too, if the accused is acquitted, however conclusive the evidence against him may have been, the public are precluded, by a provision of the constitution, from obtaining a new trial. If the defendant had that privilege, it would not be mutual. It is very essential to the due administration of criminal law that merited punishment should be prompt and reasonably certain. The obstacles in the way existing under our present rules (although perhaps necessary) give great encouragement to criminals. There is a constant hope of escape, either from the difficulties in the way of detection, or through the want of a valid indictment, the indistinct

I have referred to some of the decisions as to new trials in civil cases in England, with a view of correcting a misapprehension which exists in the minds of many, that merely because the judge who presides at the trial would, if he had been on the jury, have decided differently, that therefore a new trial ought to be granted.

As to the case before us, I feel called upon to say, that the manner in which the young woman gave her evidence at the trial, and bore herself under a very severe and protracted cross examination, impressed me favourably, and I have no doubt that from her mode of giving her evidence the jury believed she told the truth. I felt it due to the prisoner to call their attention to the circumstances under which the alleged violence took place, and absence of any complaint on her part for so long a period after it had taken place, as well as other facts of the case favourable to the prisoner.

The question as to the credibility of the witnesses was one solely for the jury, and if they believed her they were justified in finding the prisoner guilty. If I had been on the jury I do not think I should have arrived at the same conclusion, but as the law casts upon them the responsibility of deciding how far they will give credit to the witnesses brought before them, I do not think we are justified in reversing their decision unless we can be certain that it is wrong. I am not prepared, in the case before us, to go that length, and feel that we are bound to discharge this rule.

We therefore discharge the rule, and leave the sentence to be carried into effect.

The prisoner had been sentenced to be executed on the — December, and the sentence was respited by His Excellency the Governor General, until the twenty-third day of February, 1864. The sentence was finally commuted to imprisonment in the Provincial Penitentiary.

recollections of the witnesses, or the mistake of the court or jury, or from misplaced mercy. If to these should be added the chance of obtaining a new trial after conviction, through a difference of opinion as to facts between the court and jury, the mischiefs would be greatly increased. Although the evidence might, to an unprejudiced mind, appear to be conclusive against the accused, yet he would always, and his counsel frequently, think otherwise. Motions for new trials would be frequent * * * and the hope of escape from merited punishment would, notwithstanding the conviction, be constant. The law would open so wide a door for escape that it would scarcely be a terror to evil doers."

MONTGOMERY V. BOUCHER ET AL.

Promissory note—Interest—Rate of in note—Measure of damages.

Defendant having made his promissory note payable two months after date, with interest at the rate of 20 per cent. per annum, and having made default in payment thereof at maturity, upon the trial of the case in an action brought by the holder the plaintiff, against the defendant, the learned judge left it to the jury as a question of damages as to the amount they would allow after the note became due, not exceeding 20 per cent., which was objected to by plaintiff's counsel. The jury found for plaintiff, allowing interest only at 6 per cent. after the note matured. Upon motion to increase the verdict by the difference between 6 and 20 per cent. on leave reserved, *Held* that the rate of interest agreed upon by the terms of the note is the amount which should be allowed by the jury as interest when allowing interest in the nature of damages, from the maturity of the note to the entry of judgment.

ACTION brought on a promissory note dated 28th January, 1862, made by defendant, payable two months after date to R. B. Miller, or order, for \$320, at 20 per cent. per annum, for value received. Note endorsed by Miller to the plaintiff. Counts followed for money lent for interest, at the rate of 20 per cent. per annum, and on the account stated. Plaintiff claimed \$600.

Defendant denied the making and endorsing of the note, and as to the other counts pleaded never indebted.

The cause was taken down to trial at the Fall Assizes of 1863 for York and Peel, before Mr. Justice Wilson. The making and endorsing of the note was proved, and it appeared the money was borrowed to enable a patent to be taken out temporarily till a mortgage could be given for it. Plaintiff wanted Boucher to renew it, because it would soon be settled. The plaintiff claimed 20 per cent. interest from the date of the note to the time of taking the verdict.

Defendant objected that plaintiff was only entitled to recover 20 per cent. until the note matured, and after that the jury would give such damages as they thought right, not exceeding 20 per cent. He referred to *Ward v. Morrison*, 1 Car. & Mar. 368; *Howland v. Jennings*, 11 U. C. C. P. 272; *Keene v. Keene*, 3 C. B. N. S. 144.

The learned judge left it to the jury as a question of damages as to the amount they would allow after the note became due, not exceeding 20 per cent. The plaintiff's counsel objected to the charge of the learned judge. Leave was reserved to the plaintiff, if the jury gave less than 20 per cent., to apply to have added an amount to make the interest

up to 20 per cent., if the court should be of opinion that the learned judge was bound as a matter of law to direct the jury to allow that rate. The jury gave a verdict for plaintiff for \$355 51, allowing interest only at 6 per cent. after the note matured. If the 20 per cent. for the whole period had been allowed, the verdict would have been \$429 34.

During Michaelmas Term, *Tilt* moved, pursuant to leave reserved, to increase the verdict to \$429 34, on the ground that the learned judge who tried the cause should have directed the jury to find at the rate of 20 per cent. for the plaintiff during the whole time, from the date of the note to the time of rendering the verdict, in accordance with the rate of interest specified to be paid in the note.

The rule was enlarged until Hilary Term last, when the defendant shewed cause in person. He contended that the amount of damages for non-payment of a bill of exchange or promissory note, on the day it became due, was a matter to be decided by the jury, and that the established rule was to give interest in the nature of damages. That the jury were not even bound to give that. When the contract was to pay a certain sum on a day certain, with interest, the interest became a part of the principal under the contract; and when a defendant could not be held to bail for interest as damages, he could always be arrested when it was part of the agreement to pay interest. Here the contract was to pay 20 per cent. for two months. After that, the jury could give damages for not performing the contract. That the cases most favorable to the plaintiff only show that the jury might give the increased interest in the nature of damages, not that they were bound to do so. He again referred to the cases that were mentioned at the trial, and to *Mayne on Damages*, 118, 120; *Con. Stat. U. C.*, ch. 43, s. 1, 2, p. 449.

Tilt, contra, contended that the parties themselves having fixed the rate at which the money was loaned, that same rate continued, and the jury ought to have been directed to find for the plaintiff in that way. He referred to *Howland v. Jennings*, and the cases there cited; to the *Bills of Exchange Act*, *Con. Stat. U. C.* ch. 42, sec. 13, 14; *Hudson v. Fawcett*, 2 D. & L. 81; *Crouse v. Park*, 3 U. C. Q. B. 458.

RICHARDS, C. J.—The authorities all seem to concur that, as to interest accruing after the note or other instrument becomes due, it is recoverable by way of damages for the detention of the amount payable by the contract. In Williams' Saunders, vol. 1, 201, note *n.*, it is stated, "The usual covenant in a mortgage deed is to pay the principal and interest on a certain day, but there is no covenant to pay interest after that day; therefore, in debt on such a deed, the interest subsequent to the day of default must not be claimed as part of the debt, but as damages for the detention of the debt."

In Ward et al. v. Morrison, in 1 Car. & Mar. 368, the action was to recover a promissory note for £600 payable 12 months after date, at the rate of 6 per cent. The interest had been paid when the note became due; and the question was at what rate the jury should allow; 5 per cent. or 6 per cent., from the time the note became due. *Wightman*, J., in summing up said—"If the parties have made a contract for six per cent. on a bill of exchange, they must abide by that contract: but when you have to allow interest as damages for the non-payment of money at the time agreed on, you will probably think 5 per cent. sufficient." The jury found for the plaintiff, with interest at the rate of 5 per cent.

In Cameron v. Smith, 2 B. & Ald., p. 308, *Bayley*, J., said—"Although by the usage of trade interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury in order that they may find the amount; and it is competent for them either to allow five per cent. or four per cent., according to their judgment of the value of money, or they may even allow nothing, in case they are of opinion that the delay of payment has been occasioned by the default of the holder. These circumstances shew that interest is in the nature of damages and is no part of the debt."

In Price v. The G. W. Railway, 16 M. & W. 244, defendants gave a bond to the plaintiffs under an act of parliament pledging certain estate, tolls, &c., and all the interest of the company therein, to hold to plaintiffs until the said sum of £1000, together with interest at the rate of 5 per cent. per annum, payable as thereafter mentioned, should be fully

paid. And it was stipulated that the said principal sum of £1000 should be payable and repaid on the 15th January, 1844; and that in the mean time the Company should, in respect of the interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest warrants thereunto annexed the several sums mentioned in such warrants respectively, at the times specified therein. The coupons were duly presented half-yearly and paid, but the Company did not pay the principal until after action brought, when they paid the principal into court.

The question for the opinion of the court was, whether the plaintiff was entitled to recover interest from 15th January, 1844, to the bringing of the action.

Parke, Baron, in giving the judgment of the court, said, "This is substantially a mortgage. The constant and invariable practice is to give interest by way of damages in such cases." In the argument, counsel said in effect how can you imply from an express contract to pay interest to a certain day a contract to pay it beyond that day. *Parke*, Baron, said, "The jury give it as damages for the detention of the debt. It is not recoverable *as* interest on the contract itself." *Alderson*, Baron, said, "Surely there is a great difference between giving interest as damages on interest-bearing money or the contrary. If the money be employed on interest, it is reasonable to suppose it would continue to be so employed."

In *Morgan and another v. Jones*, 8 Ex. 620, the question raised was whether the mortgagee of certain shares of a vessel could, after the time for the redemption had passed, charge more than 5 per cent. interest on the loan. The mortgage deed was in the ordinary form, contained an absolute assignment of the shares of the vessel, with a proviso for redemption on payment of the principal money and interest, at the rate of 10 per cent., in six months after the execution of the deed. There was no proviso for payment of interest after the expiration of the six months.

The mortgagors contended that the mortgagees could not claim at all events more than 5 per cent. interest after the expiration of the six months from the date of the mortgage.

The judge at the trial, *Wightman*, J., was of opinion that,

as the principal was not paid at the time specified, the interest continued payable at the same rate. On the argument, Parke, Baron, said, "It was a sale of a chattel redeemable on a certain day." Then if the mortgagors do not avail themselves of that provision, the same rate of interest continues payable. It was considered that *Price v. The G. W. Railway* (16 M. & W. 244) decided the case, and the ruling of the judge at *nisi prius* was upheld.

In the case of *Gibbs v. Fremont*, 9 Ex. 25, the question of how much interest should be allowed was discussed. There the defendant, in the State of California, drew bills on Mr. Buchanan, Secretary of State of the United States, at Washington, D. C. The bills were protested for non-acceptance, and defendant was served with notice in Washington. It was left to the jury to say what was the rate of interest in California and Washington respectively from 1847, when the bills were protested, up to the time of the action brought; and whether the plaintiff was entitled to recover as damages interest, and if so, whether the interest was to be calculated at the California rate or the Washington rate. The jury found that the California rate was 25 per cent., and the Washington rate 6 per cent., and that the plaintiff was entitled to recover interest at the Washington rate. Leave was given to the plaintiff to move the court to increase the verdict by adding 19 per cent. interest to make it equal to the California rate, if the court should be of opinion that the plaintiff was entitled to recover at that rate.

In giving judgment *Alderson*, B., said—"If the interest be expressly or by necessary implication specified on the face of the instrument, there the interest is governed by the terms of the contract itself. But if not, it seems to follow the rate of interest of the place where the contract is made." He further stated—"It is not to be left to the jury at which rate he ought to pay, for it depends on the rule of law. The amount of the interest in each place is to be so left, and so also is the question whether any damage has been sustained requiring the payment of interest at all, for those are questions of fact. Here the jury has found interest to be due, and that there was damage which ought to be recovered in the shape of interest.

They have also found what the usual rate of such interest is at Washington and in California, but which rate is to be adopted by them is, as we think, a question purely of law for the direction of the judge to the jury." The court thought the California rate the proper rate, and ordered the verdict to be increased by the additional interest.

In *Keene v. Keene*, 3 C. B. N. S. 144, one of the items of plaintiff's claim was a bill of exchange for £200, payable 12 months after date, with interest at 10 per cent. per annum. Plaintiff claimed 10 per cent. interest from the date of the bill to the time of the computation of the damages. It was referred to the master. Defendant contended that plaintiff was entitled to only 5 per cent. interest in the nature of damages after the maturity of the bill. The master allowed ten per cent. interest for the whole period. It was moved to refer it back to the master for reconsideration. In argument the defendant's counsel contended the bill in effect was a bill for £220. *Willes, J.*, said—"That clearly is not so. Until the maturity of the bill, the interest is a debt; after its maturity the interest is given as damages at the discretion of the jury. Colonel Fremont had to pay 25 per cent., the (Californian rate of interest) * * * see *Gibbs v. Fremont*, 9 Exch. 25. Here a jury might adopt as the measure of damages the rate of interest which the parties themselves had fixed, and the master is substituted for a jury."

Cockburn, C. J., said—"The master has, as he well might, given in the shape of damages the rate of interest the parties themselves have contracted for. I think he has done quite right."

Crowder, J., said—"The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as the value of the money." The rule to refer to the master was refused.

In *Howland v. Jennings*, 11 U. C. C. P. 272, on the authority of *Keene v. Keene*, this court refused to reduce the verdict of a jury who had allowed interest for the whole period from the date, at the rate of 20 per cent. per annum, on a promissory note payable one month after date, with interest at that rate. The defendant contended that from the time the note became

due only 6 per cent. should have been allowed; and the judge at *nisi prius* gave him leave to move the full court to reduce the verdict, which they refused to do.

On the whole we think the weight of authority is in favor of the interest agreed upon by the parties being the proper amount to be allowed by the jury as interest when allowing interest in the nature of damages, from the time the note matures to the time the judgment is to be entered. It may also be argued that this is the proper mode of estimating the interest or damages to be allowed, as being that which was in the contemplation of the parties when they entered into the contract, according to the doctrine laid down in *Hadly v. Baxendale*, 9 Ex. 341.

The rule will therefore be absolute to increase the damages to \$429 34, pursuant to leave reserved.

Per cur.—Rule absolute.

BEVAN V. WHEAT.

Absconding debtor—Judgment against—Collusion—Attaching creditor.

On an application of one of the creditors of defendant, an absconding debtor, to set aside the judgment and subsequent proceedings in this cause, on the grounds that the same was obtained by collusion, &c. It appeared by the affidavits filed, that one of the notes on which the action was brought was dated the same day the writ was issued, 23rd September, 1863. Three days after the defendant absconded. The relations between the defendant and the plaintiff were proved to have been intimate. A lawyer had been consulted a week previously to the commencement of the action, in relation thereto, and no defence having been made to the action, *Held*, that these were facts from which it could reasonably be inferred there was collusion between the parties such as the statute was intended to prevent.

In Michaelmas Term last *Osler*, on behalf of George Mitchell Pirie, an attaching creditor of the defendant, obtained a rule in the Practice Court, returnable in the full court, calling on the plaintiff to show cause.

1st. Why the judgment and execution, and all subsequent proceedings in this cause, should not be set aside with costs, on the ground that the judgment was recovered by the plaintiff, by the fraud and collusion of the defendant, for the fraudulent purpose of defeating the claim of George Mitchell Pirie,

and other creditors of the defendant, who have issued writs of attachment against the defendant as an absconding debtor; or why the sheriff of the county of Wentworth should not be ordered to retain the money made by him under the execution in this cause, for the benefit of the said Pirie and other attaching creditors of the defendant.

2nd. Or why the judgment and subsequent proceedings should not be set aside, with costs, on the ground that the judgment was fraudulently and collusively obtained between the plaintiff and defendant, upon promissory notes fraudulently made by the defendant without good consideration, for the purpose of enabling the plaintiff to recover judgment by default, against the defendant, with intent and design to defeat and delay the said Pirie, and others of the *bonâ fide* creditors of the defendant, in the recovery of their just debts; or because the notes were given to the now plaintiff, and taken by him, with the full knowledge that the defendant was in insolvent circumstances and unable to pay his debts in full, and with the knowledge that the defendant was then about to abscond from the province, with the intent and design of defrauding the said Pirie and his other creditors.

3rd. Or why an issue should not be tried under the direction of the court, for the purpose of determining whether the promissory notes, with the judgment obtained thereon, or some of them, were or was not fraudulent, or given for a fraudulent purpose, as against the creditors of the defendant, and why, in the mean time, the sheriff should not pay into court the money arising from the sale of the goods seized in this cause, to abide the result of the said issue, if directed, and in the mean time that all further proceedings be stayed.

The rule was enlarged until Hilary Term, when *Spencer* shewed cause, and filed affidavits on behalf of the plaintiff.

Osler, in reply, also filed affidavits and referred to *White v. Lord*, 13 U. C. C. P. 289; *Ferguson v. Baird*, 10 U. C. C. P. 493; The Absconding Debtors' Act, sec. 22.

RICHARDS, C. J.—The following facts and dates seem to be clearly established by the affidavits. That the writ of summons in this cause was issued on the 23rd September, 1863,

and served on the defendant on the 24th September. The writ was specially endorsed and judgment was entered for default of appearance, on the 6th of October, for \$1229 22 damages, and \$22 13 costs. That a *fi. fa.* against goods was issued and placed in the hands of the sheriff of the county of Wentworth on the 14th of October, which was endorsed to levy for the amount of the damages and costs. That one of the notes on which the judgment was signed was payable to the plaintiff or bearer, and was dated on the 1st of Sept., 1863, payable one day after date, for \$672 50. Of the other notes, one for \$200, payable to W. E. Horton, is dated August 6th, 1863 ; another for \$300, payable to W. E. Horton, is dated the 20th of August, 1863 ; another for \$34, payable to W. E. Horton, is dated the 23rd September, 1863, and the other for \$14, payable to W. Daly, is dated the 14th of September, 1863. All these notes were payable one day after date. That the defendant, Wheat, absconded on Saturday, the 26th of September, 1863. On the 10th of November an attachment against Wheat issued out of the county court of the county of Wentworth for \$102 75 in favour of Pirie, the person making this application, which was placed in the sheriff's hands the same day.

On the 29th of September a warrant or writ of attachment was issued out of the second division court of the county of Wentworth, at the suit of Pirie, against Wheat and Ogden, for \$91, which was placed in the hands of the bailiff on the same day, and on the 30th of September a similar writ issued out of the same court against same parties at the suit of Alex. Cameron and James Campbell, and was placed in the bailiff's hands on the same day for \$63 71, and the goods seized under these warrants were delivered to the sheriff of the county on the 21st of October, 1863. Goods to the value of — have been sold by the sheriff of the county of Wentworth, under the execution in this cause, and the money now remains in his hands.

From the affidavits filed, it appears that Wheat, the defendant, and one Henry Ogden, were residents of the State of New York, and came to the town of Dundas and started the business of brewers in the month of April, 1863, that Ogden

continued to reside in the State of New York and Wheat remained at Dundas to carry on the business there. That they represented themselves as possessed of considerable means and property, and they obtained credit to a large amount in the neighbourhood. That about the middle of August Wheat stated that the partnership had been dissolved, that Ogden had retired from it and the business belonged to him alone. That about the first week in September, plaintiff Bevan, who had resided in the same part of the State of New York as Wheat, came over to Dundas and appeared to be carrying on the business with Wheat, and Wheat represented him as his partner in the business.

The debts and liabilities of Wheat and Ogden, besides the amount claimed in this cause, amounted to about \$2800, and after deducting the claim of the landlord for rent, and of the government for excise duty, his assets, which he left behind him, would not sell for more than \$350 at sheriff's sale.

The party applying also filed affidavits that the plaintiff admitted he was a partner of Wheat. The plaintiff filed affidavits in reply.

The facts favourable to the application, as shewn by the affidavits filed, may be summed up as follows: That the judgment on the face of it is for a much larger sum than could have been due from the defendant to plaintiff on any claim arising between them personally, and this is admitted. That when the explanation is offered as to the amount due Horton and Daly, no affidavit is produced from either of them shewing that the claim is *bonâ fide*, and no excuse offered for not producing such affidavit. That plaintiff admitted to two or three persons that he was a partner of Wheat. That plaintiff and Wheat were known to each other in the United States, and plaintiff came to this province either with a view of becoming defendant's partner or of taking some interest in his business. That he admits that he, at one time, thought of going into business with Wheat, but when he came to understand Wheat's position and affairs, he wholly refused to enter into partnership with him. That Wheat's affairs appear to have been in a desperate condition, and it is probable that plaintiff, from what he states, knew of this. That one of the notes sued on

in this cause is dated the 23rd September, the very day on which the specially endorsed writ was issued. That this writ was personally served on the defendant on the 24th of September, (Thursday), and he absconded on Saturday the 26th of September. That plaintiff and Horton, the former apparently an old friend of his, and the latter, a person who had been some time in his employ, were left in possession of his premises, and, it is represented, were most desirous of not having it known that defendant had absconded. That defendant took no steps to defend the suit, nor was it known that plaintiff had sued him until some time in November, as far as we have heard; some division court attachments having in the meantime fastened on the property. The defendant himself has not made any affidavit explaining the matter, and it does not appear that any other of the creditors of the defendant, except these immediate friends of his who came from the United States either with him or to engage in his business, were able to effect service on him so as to obtain a judgment for their debts.

On the other hand, the plaintiff shews how a considerable portion of the money he loaned to the plaintiff was applied. He shews that Horton, who had been in defendant's employ from the time he first came to Dundas, had these notes; they have different dates, as if indicating real transactions, and if they had been intended to represent fictitious debts that the small note for \$34 would not have been dated the very day the suit was commenced. The other person, Daly, it is not denied, was in the defendant's employ, and the plaintiff swears the whole proceedings were instituted to recover what he believes to be honest debts, and not to defraud any of the defendant's creditors. That the way in which the suit came to be instituted in his name for so large a sum is satisfactorily explained, as well by his own affidavit as that of Mr. Cragie. That the affidavit of Mr. Hamilton, filed by the applicant, shews that at the time he spoke to him, he claimed at least \$580 as due him from Wheat. Plaintiff also denies having admitted that he was a partner of Wheat, and denies that he was aware that Wheat intended to abscond, but supposed he intended to return. Some of the charges in Pirie's affidavit

are not answered by plaintiff, but the facts on which these charges are based are not stated with such certainty as to permit of a denial as to facts. Some of the circumstances contained in the last affidavit, filed by Pirie, are strong as to Horton, but there has been no opportunity to answer them.

It certainly does seem strange, that no affidavit from Horton or Wheat is produced or the absence of such affidavit satisfactorily accounted for. I believe it was stated on the argument that their residence was not known; but there is no affidavit to that effect.

On the whole, without feeling justified in deciding that there is not a *bona fide* debt or debts on which to base this judgment, I am of opinion that the action was brought collusively to enable the plaintiff to recover the debts contained therein, in full, to the prejudice of the defendant's other creditors. The service of the writ on Thursday, 23rd Sept.; the giving of the note on that day; the absconding of the defendant on the Saturday following; the intimate relations between the defendant and the parties who were to profit by the judgment; the fact of a lawyer having been consulted about suing the defendant a week before the suit was commenced, and the probability of the parties having been informed that if no defence were put in they would obtain speedy judgment; the omission on the part of the defendant to defend the suit, and the want of a statement by plaintiff denying that defendant was aware that by obtaining the judgment he, plaintiff, would get a priority over his other creditors, and that he, defendant, did not intentionally aid them in doing so, with the other facts of the case, lead me to the conclusion that this is one of the cases the statute was intended to prevent, and the proper course to follow will be that which this court pursued in *White v. Lord*, 13 C. P. 289. The rule will therefore be absolute to set aside the plaintiff's execution, and to stay all further proceedings on the judgment until further order, and the plaintiff may use the judgment as the foundation of a writ of attachment, and he may thus be in a position to share rateably with the other creditors of the defendant.

Per cur.—Rule absolute to this extent, with costs, to be paid by the plaintiff.

HENEKER V. THE BRITISH AMERICA ASSURANCE COMPANY.

Insurance—Lease—Forfeiture—Condition on policy—Increase of risk.

A new action having been brought on this policy, alleging a total loss by fire, the defendants pleaded a condition of the policy as set out in 13 C. P. U. C. 99, on which the judgment, as given in the former case, was adhered to. The defendants further pleaded that the British American Land Company, of which company the plaintiff is commissioner, had, before the policy, leased the property to one Lomas, who had covenanted to insure and keep insured, and that Lomas, as lessee, made additions to the buildings which increased the risk, and that such increased risk was within the control of the land company as lessors, whereby the policy was avoided according to one of the conditions endorsed.

Held, that these additions, made by a lessee, were not within the control of the lessors.

Held, also, that the provision in the lease that the lessee should not make alterations "in the arrangement of the mill or machinery," was not a prohibition from putting up additional buildings; but if it were, the defendants had no right to resist payment of the insurance, because the landlord might have a right of entry for a forfeiture by the tenant.

The plaintiff demurred to the defendants' plea, and the defendants have obtained a rule calling on the plaintiff to shew cause why his verdict should not be set aside, and why a new trial should not be granted, because the verdict is against law and evidence, and the judge's charge, in so much of the first plea as applies to the increase of risk, because the evidence, it is alleged, was clear to show that this risk had been increased, and also for misdirection in this, that there was no evidence to establish that the risk had been increased by anything within the control of the plaintiff. The lease from the plaintiff to the tenant, establishing that in law the property destroyed was in the control of the plaintiff.

This was a new action, brought since the decision of this court on the same policy, in 13 C. P. U. C. 99. The declaration stated that the plaintiff, as the commissioner of the British American Land Company, effected this insurance from loss by fire on a three story brick building covered with wood, known as the Sherbrooke Woollen Factory, including the addition thereto, used as a dye house, situate on the east bank of the river Magog, in the town of Sherbrooke, in Canada East, the sum of \$1500, and on the machinery, driven by water power, \$1438. The policy was from the 1st of October, 1861, for one year. The defendants covenant with the plaintiff, and his successors in office, to pay the loss in case of fire.

The plaintiff averred a total destruction of the property by fire, after the making of the policy and before the 1st of Octo-

ber, 1862, and that damage was sustained to a large amount, to wit, to the sum of £3000, of which the defendants had notice.

The plaintiff alleged that at the time of effecting this policy the Western Assurance Company insured the same property for \$2938, and the Sherbrooke and Stanstead Mutual Insurance Company insured the machinery for \$1324, which were in force at the time of the fire, of which the defendants had notice. The plaintiff then alleged performance of all things on his part, and that he is entitled to recover from the defendants the two sums before mentioned, amounting to \$2938.

The defendants second plea set out a condition of the policy, the same as was set out in the 5th plea in the 13 vol. of our reports before referred to, and as it was held that such a plea is no defence, it is unnecessary to say anything respecting it. The court gave judgment according to the judgment already pronounced.

Then as to the rule, the case turns wholly on the following plea, upon which issue was taken. That among the conditions endorsed on the policy was the following :—"If any person, assuring any building or goods in this office, shall make any material representation or concealment, or if, after insurance effected, either by the original policy or by the renewal thereof, the risk shall be increased by any means whatsoever, within the control of the assured, unless such alteration or addition shall be allowed by endorsement on the policy, and such increased premium paid as may be required, such assurances shall be void and of no effect." And the defendants say that before, and at the time of the making of the policy, the British American Land Company had, by deed, leased the said building and machinery to one Adam Lomas, for ten years, which term had not, at the time of the commencement of this suit, expired, and that Lomas, by the deed, covenanted with the land company that he would insure, and keep insured, the said building and machinery, during the lease, for the sum of \$7252, against loss by fire, and also that he would repair, &c. And the defendants say that in effecting the insurance the said Lomas made the application therefor to the defendants, and acted as the agent of the plaintiff as such insurer, and paid the premium

to the defendants, and was at all times during the continuance of the policy, the agent of the plaintiff in respect to the said building and machinery, in reference to the insurance thereon with the defendants. And that after the making of the application and policy, and before the fire, and while the lease was in full force and the said Lomas was such tenant and agent of the land company, the said Lomas made divers additions to the said buildings so insured, and in which the said machinery was contained, and by such additions to the said building, so insured, which were within the control of the plaintiff, the risk of the defendants in the said insurance was increased without the knowledge or consent of the defendants, and without any allowance thereof by endorsement on the said policy, whereby the said policy became void."

The following evidence, material to this issue, was taken at the trial :

Andrew M. Smith, for the defendants, said—[His evidence, at a former trial, was read and received by consent]—I am defendants agent at Sherbrooke. An insurance was effected in plaintiff's name through me; the plan produced was furnished by the plaintiff, showing the original position of the the buildings and the alterations. I was not aware of the alterations until after the fire. The external risk to the building was increased by the addition of this wooden building. It was 30×40 feet, and a small house 18×7 feet. In the old building, in the dye house, nothing intervened between the floor and the roof. I could not say as to the internal risk, but should say, so far as the furnaces are concerned, the risk is diminished; this was a special risk. I had notice at the time the insurance was effected that the premises were in the possession of a tenant. The interior risk to the insured buildings was decreased by the alterations. If I had been informed of the change, I would have referred the matter to the head office, considering the risk increased by the erection of the wooden buildings, and as the risk was special I would not have decided, but have referred it to the company to decide if they would cancel the policy or increase the rate. As a general rule, I would charge an increased risk under ordinary circumstances on the erection of a wooden building adjoining a brick

one. I would not take a risk for defendants when the dye house is of wood. I am especially instructed not to do so.

Andrew Lomas says—I was tenant of the factory. I made no application in respect of the policy in question. I was not aware of the policy. I never informed the plaintiff of my intention to erect the new building. Before the lease, and up to 1st October, plaintiff, or the land company, paid the insurance and charged it against me in account. The 1st half year's rent fell due in February, 1862. I have always paid the charges for insurance, and have no doubt I paid that from 1st October, 1861, to 1st February, 1862. In February or March, 1862, I put up the new building. I leased the additional piece of ground with the view of putting up some additions, and I so informed the plaintiff. Plaintiff and Mr. Lawford, his agent, both live in Sherbrooke. I got additional machinery after the lease, but did not communicate this to either the plaintiff or Mr. Lawford. I never told the plaintiff or Lawford what I meant to do. The large building was finished in March, the small one never was finished.

Lindsay B. Lawford says—I am in the office of the land company at Sherbrooke. I signed the applications shown me for the land company. I had no communication with Lomas respecting either when the lease was executed. I paid the premiums on the last policy for the land company. I never heard of these buildings. The premium was charged to Lomas in account, as he had covenanted to insure. The land company had a general account against Lomas, and he would make payments which would be placed to his credit, he making no special applications of the payments. The fire took place about half-past four in the morning of the 8th of June, 1862.

Two other witnesses said, in effect, the external risk was increased by the change. The internal risk was diminished by it, and on the whole the risk was diminished.

The learned *Chief Justice of Upper Canada* charged the jury, that as a matter of legal inference, from the terms of the lease, the alterations, that is the erection of the two wooden buildings were not within the control of the plaintiff, and he submitted to them the following questions :

Had the plaintiff, by himself or his agent, control ?

I shall say the lease does not restrict the tenant from putting up additional buildings, nor do I think the putting them up would, so far as I can see, enable the land company to have avoided the lease. The language of the last clause does not satisfy me that this alteration would be "a non-compliance in good faith with the conditions of the lease," and so avoid the lease.

Was the risk in fact increased?

This is not to be tried by the consideration of an increase of risk on the one side, balanced, or over-balanced by a diminution of risk on the other. I think the weight of evidence is in favour of the conclusion that there was increased risk. I shall say so distinctly. The question raised by the plea, did Lomas insure for and as agent of the plaintiff? is, I think, negatived by the evidence; but I leave it also to the jury.

The defendants counsel objected to the ruling with respect to the construction of the lease, and the legal inference to be drawn from it.

The jury found for the plaintiff, and also, first,—the risk was not increased, and secondly, that Lomas had nothing to do in the transaction. They did not specially find whether the plaintiff had control or not.

Galt, Q. C., with whom was *Anderson* for the plaintiff, referred to the decisions in our own courts before mentioned.

J. H. Cameron, Q. C. for the defendants. The alterations were according to the terms of the lease from the land company, within the control of the plaintiff, and the learned Chief Justice should have so told the jury, and the jury should have so found. The alterations in this case avoided the lease. *Arnsby v. Woodward*, 6 B. & C. 519, and as the plaintiff did not avoid it he must be held to have waived the cause of forfeiture, and therefore to have adopted the erections made as his own. The additions made constituted waste in law. *Arch. Land & Ten.* 572; *Woodfall's Landlord & Tenant*, 272, 284, 734, 919; *The King v. Pedly*, 1 A. & E. 822; *Rich v. Basterfield*, 4 C. B. 783; *Wilson v. Wilson*, 14 C. B. 616.

ADAM WILSON, J.—The question really is, is the plea

proved? The substance of the plea is, that the policy was avoided, because Lomas, as the tenant and agent of the land company, made divers additions to the buildings insured, which increased the risk, and did not obtain the allowance thereof by the defendants, and that such additions were within the control of the plaintiff.

The facts shew that Lomas did as the tenant, but *not* as the agent of the land company, make the additions; that the additions did increase the risk, and were not allowed by the defendants; and that the additions were *not* within the control of the plaintiff. But it is argued by the defendants that however the facts may be, considered by themselves, and apart from the conditions of the lease, that in law the facts, as complemented and controled by the lease, shew that Lomas did as the *agent*, as well as the tenant of the land company, insure; and that the additions *were* within the control of the plaintiff.

The lease was made before the policy, and the defendants had full knowledge of Lomas being the tenant, as it is contained in the application for insurance; and it provides among other things, as an engagement on the part of Lomas, "that no alteration in the arrangements of the mill or machinery shall be made without the consent of the commissioners of the land company. And it is further expressly agreed that *
* * a non-compliance in good faith with the conditions of this lease shall be good ground for having the same declared null and void." We quite agree with the ruling of the learned Chief Justice, "that the erection of the two wooden buildings was not within the control of the plaintiff," and "that the tenant is not restricted from putting up additional buildings." Such erection, of course, could only be within the control of the plaintiff, by reason of some special power or condition contained in the lease conferring it—that is construing this Lower Canada lease by the like rules for this purpose with which we should construe a lease of realty in our own province—for during the lease the tenant is as much the owner of the land for his limited interest, as the tenant of the fee is for his larger estate. The landlord cannot enter upon his tenant, unless by a reservation to that effect, without con-

stituting himself a trespasser, the same as if he were the merest stranger; and during this term the tenant may build as much as he pleases, without regard to the landlord, unless he infringe on the rules against waste (Huntley v. Russell, 13 Q. B. 572) of which we know nothing whatever how far, if at all, they are applicable in the lower province; but even if we knew that the law of waste prevails there as it does here, there is no pretext for saying that these wooden buildings constituted waste: they may not even be let into the ground, but be resting only on the surface; and we know of no rule which permits a stranger, such as these defendants are, to set up as against the landlord acts of the tenant which it is entirely optional with the landlord to consider as waste or not, or as a forfeiture or not.

The landlord is breaking no engagement *with this insurance company*, even if he have the power to enter for a forfeiture and to avoid the lease, because he does not take advantage of the forfeiture and determine it, for he never bound himself to do so; and even if he did so, this would not save the insurance, for that, according to the argument of the defendants, has been lost already. As the same act which conferred the right upon the landlord to eject his tenant, has conferred it upon the insurance company also to defeat the landlord. So that let the landlord enter or not, he must equally lose his insurance; and yet it is not pretended he should lose it, if he had not the right to enter.

So far, then, we see nothing which prevented the tenant from erecting these buildings apart from any special condition in the lease; and even if the right of entry were given by the lease for the making of such erections, we see no reason why these defendants can require the landlord to enforce his right for their benefit, when he is not obliged to do so even for his own. If these erections had been made with the express consent of the plaintiff, it might have been well said that the buildings were under his control; but when they are made without his knowledge, we do not think they must be held to be within his control, because he does not create a forfeiture of the tenancy which might be very prejudicial to him in every way, and could not, with all his diligence, preserve his policy.

But in all this we are construing the lease more favorably for the defendants than we think it is capable of being construed. The lease does not provide, as the plea says, that the additions which increased the risk should create a forfeiture, nor strictly for additions of any kind. We think, without risk to the validity of this lease, that Lomas might have put up as many additions as he pleased, because the lease only provides against alterations "in the arrangement of the mill or machinery," a wholly different provision and inserted for a wholly different purpose from that adverted to in the plea.

For these reasons we find the plea not proved, and we quite agree in the direction of the learned Chief Justice at the trial. There was no misdirection of any kind, and the verdict was the only one which could have been given according to the evidence.

The rule, therefore, will be discharged.

Per cur.—Rule discharged.

TYKE v. COSFORD.

Account stated—Evidence of.

In support of an account stated as set out in the declaration the following memorandum was put in as evidence:

\$300—Good to T. T. to the amount of \$300, to be paid to him, or his order, at E. C.'s mill, in the township of Elma, in the county of Perth, in lumber at cash price.

(Signed,) J. C., Sen.
J. C.

Held, a sufficient acknowledgment of debt or liability, and a promise to pay, and that it imported a sufficient consideration to sustain the account stated in the declaration.

This was an appeal from the county court of the county of Wellington, in ordering the plaintiff's verdict to be set aside and a nonsuit to be entered. The declaration stated

1st. That the defendant Cosford, and one John Cosford, who died before the commencement of the suit, being, on the 27th of July, 1861, indebted to the plaintiff in the sum of \$300, for money found to be due from the defendant and John Cosford to the plaintiff, on accounts stated between them, did then, in consideration of such indebtedness, in writing acknowledge themselves so indebted to the plaintiff in the

sum of \$300, and agreed to pay the same to the plaintiff or his order, in lumber, at cash price, at Edward Cosford's mill in the township of Elma. And the plaintiff says that although he has always been willing and ready to receive the lumber at cash price, at the said mill, in payment of the \$300, according to the agreement, yet the defendant did not at any time, nor did John Cosford, in his lifetime, deliver the lumber to the plaintiff, or to any one on his behalf, at the said mill or elsewhere, although a reasonable time for such delivery had elapsed before the commencement of this suit, but neglected and refused so to do.

2nd. That the defendant was indebted to the plaintiff for money found to be due to him on an account stated.

The defendant pleaded to the first count;

1st. He did not promise.

2nd. A denial of the breach.

3rd. Payment.

And he also demurred to it because it contained no sufficient breach of performance of the agreement, and because it did not shew such a demand or refusal as to entitle the plaintiff to recover.

To the second count the defendant pleaded;

1st. Never indebted.

2nd. Payment.

3rd. Set off.

Upon which issue and joinder were taken.

The agreement put in at the trial was as follows :

PEEL, July 27th, 1861.

\$300—Good to Thomas Tyke to the amount of three hundred dollars, to be paid to him, or his order, at Edward Cosford's mill, in the township of Elma, in the county of Perth, in lumber at cash price.

JOHN COSFORD, SEN.

JAMES COSFORD.

A good deal of evidence was given on both sides, as to whether the plaintiff had ever demanded lumber and been refused, but it is not material for us to consider this question as the case does not turn upon it; but it does seem it would

be difficult for the plaintiff to treat the defendant as guilty of default for non-delivery of the lumber, when no time is mentioned for it, and when therefore the defendant could not be prepared to perform his agreement until he was specially notified by the plaintiff when it was he desired the delivery to be made; and when it may be the plaintiff might also have to specify the kind of lumber that he would require; it does not even appear that the plaintiff was ready and willing to have received the lumber; but this may be corrected in the court below if the plaintiff is entitled to succeed in his present application, which assumes the plaintiff's cause of action to be correctly stated.

The objection to the plaintiff's recovery turned upon the exceptions taken by the defendant's counsel at the trial.

1st. That the memorandum produced was not sufficient evidence of an account stated.

2nd. That there was no evidence of any consideration *dehors* the contract or due bill, or consideration to support either count.

3rd. That the memorandum shews a void promise.

The plaintiff obtained a verdict subject to the defendant's moving to enter a nonsuit on these grounds.

The defendant did move, and his rule for entering it was made absolute.

The learned judge, in giving judgment, was of opinion that the memorandum above mentioned, "good to, &c.," did not import any consideration as the words "value received" were held to import in *Waddel v. McCabe*, 3 O. S. 502, and that the admission by the defendant to one of the witnesses, when he presented the writing to him, that it was "all right, and he would have to pay it," was not sufficient evidence of any previous liability or consideration to make him chargeable.

It is against the rule for a nonsuit, upon this ruling, that the plaintiff has appealed.

The case was argued this term by *S. Richards*, Q. C., for the appellant. He referred to *Chitty on Bills*, 10 Edn. 357; *Belcher v. Cook*, 4 Q. B. U. C. 401; *Cummings v. Freeman*, 2 *Humphreys*, 143; *Harrow v. Dugan*, 6 *Dana*, 341; *Marrigan v. Page*, 4 *Humphreys*, 247.

Jno. Read, contra, objected that there was no consideration on the face of the instrument. He referred to *Boulton v. Jones*, 19 Q. B. U. C. 517; *Fahnestock v. Palmer*, 20 Q. B. U. C. 307; *Corporation of Perth v. McGregor*, 21 Q. B. U. C. 459; *Reed v. Reed*, 11 Q. B. U. C. 26; *Teal v. Clarkson*, 4 O. S. 372; *Hall v. Morley*, 8 Q. B. U. C. 584.

ADAM WILSON, J.—The grounds of appeal stated are to the effect,

1st. That the plaintiff should not have been nonsuited.

2nd. That the instrument produced at the trial was evidence of an indebtedness by the defendant to the plaintiff as alleged.

3rd. That the evidence of the acknowledgment, made by the defendant on production to him of the instrument, "that it was all right and he would have to pay it," was evidence of an indebtedness to be left to the jury.

4th. That there was evidence sufficient to entitle the plaintiff to maintain his verdict.

We shall lay the account stated out of the question, as there was no evidence given to prove any account stated in fact, or any other accounting than that which, it is contended, is to be implied, and was the consideration for the making of the special agreement; and as the promise made on that occasion was to pay in lumber and not in money, it cannot support the account stated and set forth either in fact or in law. *Hopkins v. Logan*, 5 M. & W. 241. We shall therefore consider the proceedings only with regard to the first count, and the pleadings connected with it, so far as they are applicable to this appeal.

The words "value received" have been decided to import a good consideration; but there is no decision that the words of such a writing as the one in question do so.

A document in the common form I O U so much money, "is evidence of an acknowledgment of debt, to be received on the account stated." *Curtis v. Richards*, 1 M. & G. 46; *Fesenmayer v. Adcock*, 16 M. & W. 449. O [owe] contains the acknowledgment, and U [you] is the person to whom it was delivered, and who is presumed to be the person suing upon it in the absence of evidence to the contrary.

The instrument in question expressly names this plaintiff,

so that he is the person to sue upon it, if any one can do so. Does it also contain an acknowledgment of debt? for if it do it will be *prima facie* evidence of an account stated, that is of its having been given upon a statement and settlement of accounts.

The words are “*Good to Thomas Tyke to the amount of \$300, to be paid to him, &c.*” This seems to be an express declaration or acknowledgment of debt, for whatever *good* may mean, *to be paid* must surely mean something. Suppose “good” had not been there at all, but the instrument had been merely “the amount of \$300 *to be paid* to Thos. Tyke, &c.,” it can scarcely be doubted that this would have been as strong and as direct an acknowledgment as could well have been made of a debt against the person making it. There can be no difference between “\$300 to be paid to Thos. Tyke,” and “I O Thos. Tyke \$300.” A plain I O U so much money is evidence of an account stated, but with the words “to be paid” it becomes a promissory note. *Brooks v. Elkins*, 2 M. & W. 74; *Waithman v. Elsee*, 1 C. & K. 35. The words then *to be paid* have some meaning, and that is that they create an express promise, and if this instrument had been payable in money instead of in lumber, it would clearly have been a promissory note.

With these words then there can be no doubt that there is not only an acknowledgment of debt, but a promise to pay it in the manner provided for, and I should rather have been inclined to hold that the word *good* would have amounted to an acknowledgment, sufficient to have sustained the account stated declared upon if the instrument had been payable in money. There need be no precise form of words to constitute an acknowledgment of debt or liability. As “I owe you” is an acknowledgment, “due to you” should be so too, and it is so according to the cases in *Hump. Rep.*, why not also “good to you?” But without resting upon this at all, we think that this instrument does contain an acknowledgment of debt and a promise to pay it, and does import a sufficient consideration of being based upon a previous settlement of accounts to support the promise to pay the amount of it in lumber. It is not necessary that this consideration should expressly appear upon the face of

the instrument itself, it will equally answer if it can be implied from it, or evidence entirely beyond it may be given to prove the consideration.

The case of *Davies v. Wilkinson*, 10 A. & E. 98, is not altogether unlike this case. The instrument there was in this form :

“I agree to pay C. D., or his order, £695 at four instalments, to be paid on, &c.,” [making £600] “the remainder, £95, to go as a set off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. D. to him.

JAMES WILKINSON.”

This was of course held not to be a promissory note.

The first count was upon this special agreement, and it alleged an accounting between the plaintiff and defendant of divers moneys due and owing by the defendant to the plaintiff, and then unpaid; and upon that accounting that the defendant was indebted to the plaintiff in the sum of £695, and being so indebted, he, the defendant, in consideration thereof, then agreed, &c., as in the writing above stated.

The second count was upon an account stated.

The defendant's counsel, at the trial, objected that the instrument produced varied from the first count, as it did not shew any such statement of account prior to the agreement, and that it did not support the second count. The objections were renewed in Term. Lord *Denman*, C. J., said, “it is said that no consideration appears to support the first count; but the promise itself imports a consideration, and he who says ‘I promise to pay you £100,’ may, without any violent construction, be supposed to say, ‘we have settled accounts and I am to pay you £100.’ It is objected then that the instrument proved merely shewed a *nudum pactum*, but the words ‘I agree to pay,’ are a perfect promise, and they import a consideration. It was not necessary that the document put in should be a complete agreement on the face of it, for it is only offered as evidence that such a transaction existed as the document refers to, and undoubtedly it is evidence of that.”

Littledale, J., said, “as to the objection that no consideration appears on the document, that is true, but it supports the

avermment in the declaration that the parties came to an account together; and there can be no doubt that they had come to an account in which £695 was to be paid to the plaintiff. The statement in the writing itself is evidence that there had been an account." Other cases might be added to the same effect, but not quite so applicable.

If then there be no difference between the mode of payment as set out in the agreement just referred to, so much in money and the rest by way of a set off against a particular debt, and in the agreement in hand, in lumber, then the case just cited is a decisive authority in favour of the validity of this instrument, and of the mode in which it has been declared on, and of what it imports; and as we can perceive no difference between an agreement to pay so much money by way of a set off against a particular debt, and an agreement to pay so much in lumber, for they are both agreements not to pay the plaintiff in money, we think the first count of the present declaration sustained both in fact and in law. We have no doubt that the same result could have been established upon the mere basis that this is at least an acknowledgment of debt or liability, like an I O U, and as the acknowledgment in the one case is evidence of an account stated, so it should be in the other also; but it is more satisfactory to find that the question has already been decided by the high authority to which we have alluded.

We think then that the rule ordering the verdict for the plaintiff to be set aside, and a nonsuit to be entered, should be discharged.

Per cur.—Rule discharged.

FRASER ET AL. V. FRASER ET AL.

Ejectment—Statutes of Limitations—Maintenance—Alterations in deed—Cancellation of deed—Memorandum by witness—Witness refreshing his memory—"Assign" sufficient to pass fee in land—Infant having title and living on land to be deemed in possession.

One A. F. being the owner of a full lot of 200 acres, in 1823 conveyed the west half thereof to his son I. in fee, who went into possession. In 1827 or 28 I. removed from the lot and died out of the actual possession in January, 1829 or 30, leaving a son R. born in 1824. After I.'s removal from the lot, A. F. took possession. On the death of I., A. F. brought I.'s son R. to live with him on the land, where he continued to reside till A. F.'s death in 1841. In March, 1839, A. F. made a conveyance of the west half to another

son of his N. P. F. in fee, who went into possession and died thereon in March, 1841, devising same to his son J. F., one of the defendants. The mother of J. F. married one L. and continued to reside on the lot with her husband till 1848 or 49. After A. F.'s death the deed to I. was found among his papers with the seals torn off. In 1847 R., the son of I., brought ejectment against L. and wife for this west half, which suit was compromised by R. agreeing to convey in fee to J. F., the son of N. P. F., the west half of the said west half, and by L., on behalf of J. F., agreeing that J. F. should, on his coming of age, convey in fee to R. the east half of said west half of lot. R. conveyed the portion to J. F. but J. F. never conveyed to R. the east half of west half, the subject of this action. In 1847, after this settlement, R. conveyed the portion in question to one D. R. through whom plaintiffs claim, while L. and wife were in possession of the lot.

Held, 1st. That the nature of A. F.'s possession was for the jury to determine.

2nd. That while R. was living with A. F. on the land he could not be treated as out of possession.

3rd. That the sale made by R. while L. was in possession, but after the compromise, and after L. had acknowledged R.'s title, was not void for maintenance.

4th. That the cancellation of a deed does not divest the estate which has passed by it.

5th. That the erasure of the date is not to be presumed to have been made after execution; but even if it were, the deed is good by its delivery.

6th. That a witness may, to refresh his memory, refer to a memorandum made near the time when the event occurred, when the fact was fresh in his mind.

7th. That "assign" is a good operative word to pass the fee.

EJECTMENT to recover possession of the east half of the west half of lot No. 26, in the 5th concession of the gore of the township of Fredericksburgh.

The defendant, James Fraser, defended for the whole of the land claimed, the other defendant did not appear at all.

The plaintiffs claimed "under and by virtue of an indenture of mortgage from John Staatts Fralick to Allan McPherson Fraser, dated the 26th of December, 1860, and under and by virtue of an assignment of the mortgage from A. M. Fraser to John Stevenson, dated the 13th of February, 1861."

The defendant, James Fraser, by his notice, denied the title of the plaintiffs, and asserted title in himself to the land "by virtue of and under the last will and testament of his father, Noah Paine Fraser, deceased, dated the 21st of April, 1861."

The cause was tried before Mr. Justice John Wilson at the last Kingston assizes, when a verdict was rendered for the plaintiff.

In the last Term *Harrison, R. A.*, for the defendant, James Fraser, moved for and obtained a rule upon the plaintiffs, calling upon them to shew cause why the verdict should not be set aside and a nonsuit entered pursuant to leave reserved, upon the following grounds:

1st. That the deed to Isaac Fraser, under which the plaintiffs claim title, appeared on its production to have been altered and cancelled, and no explanation was offered as to the same.

2nd. That the title of Isaac Fraser, and those claiming under him, was shewn to have been barred by the Stat. of Limitations.

3rd. That the deed from Randolph Fraser to David Roblin, under which the plaintiffs claim was made, at a time when Lake was in adverse possession, and so void under the Statutes of Maintenance.

4th. That the deed from Cephas Miller to Allan McPherson Fraser is not an operative grant but a quit claim only, and no previous estate is shewn in Allan McPherson Fraser, upon which it could take effect.

5th. That there was an erasure in the deed from Allan McPherson Fraser to John Stevenson which was unexplained. Or to shew cause why a new trial should not be had upon the grounds

1st. That the verdict is contrary to law, evidence, and the weight of evidence, in this, that the deeds under which the plaintiffs claimed, shewed an alteration of which no explanation was given; that if Isaac Fraser ever acquired any estate in the land he reconveyed it to his father, Abraham Fraser, and, that according to the weight of evidence the title of Isaac Fraser, and those claiming under him, was barred by the Statute of Limitations.

2nd. For the reception of improper testimony in this, that the record and recovery in ejectment in the suit of Doe dem Fraser v. Lake, which were *res inter alios actæ*, were received in evidence in rebuttal of the case of the defendant. That the evidence of George A. Detlor was admitted in answer to the case of the defendant, which case had not set up new matter, but simply met the testimony given by the plaintiff in chief; and, that this witness was allowed to refresh his memory by referring to an entry made in his diary several days after the occurrence he spoke of was said to have taken place.

Or 3rd. Upon the ground of misdirection, in this, that the learned judge told the jury to consider in relation to the question of the Statute of Limitations, the fact that R. Fraser had a right to enter on the land before he made an entry.

The facts appeared to be that Abraham Fraser owned the whole lot, No. 26 ; that on the 26th of March, 1823, he conveyed the west half, consisting of 100 acres, to his son Isaac, in fee ; that Isaac thereupon took possession of the west half, and built upon it and lived there for some years ; that Isaac, with his wife and family, left this lot in the spring of 1827, as the defendant says, but in the spring of 1828 as the plaintiffs say. Isaac went to Adolphustown and took a tavern for one year ; his wife died at Adolphustown on the 9th of October, 1828, as the plaintiffs say ; he gave up the tavern upon this and moved with his family to Colborne where he died on the 30th of January, 1829. Isaac left a son, Randolph, who was born on the 14th of July, 1824. Abraham, after Isaac's removal from the lot to Adolphustown, went into possession of it, the plaintiffs say, as a mere caretaker of it for Isaac, the defendant says either by virtue of a deed made to him by Isaac, or by virtue of some arrangement by which it was again to be Abraham's property, or by a claim or right or title to it in himself, adversely to Isaac. Abraham, on Isaac's death, went to Colborne and brought Isaac's body from there to Fredericksburgh, and also Randolph, Isaac's son, and, it is said, all Isaac's goods and papers. Randolph continued to live with his grandfather Abraham from this time, that is from about the end of January, 1829, until his grandfather's death in 1841. Abraham occupied the west half during all the time that Randolph was living with him, up to the 4th of March, 1839, when Abraham made a deed of the same to another son of his, Noah Paine Fraser, in fee. Noah Paine Fraser took possession of this west half in 1839, and died in possession of it in March, 1841. Noah Paine Fraser made a will by which he devised this half lot to his son James Fraser, the present defendant. The widow of Noah continued in possession of the west half from her husband's death till 1846, when she married James P. Lake, the defendant, who has not appeared, and Lake and his wife continued this possession till 1847 or 1848, as the plaintiffs say, but until 1849 as the defendant says. In 1847 an ejectment was brought by Randolph against Lake for the recovery of the whole west half. It was arranged by Roblin, the uncle of Randolph, and Lake,

as representing James Fraser, the son of Noah, James being then about thirteen or fourteen years of age, that Randolph should take a verdict in the ejectment by consent, and that Randolph and James, the son of Isaac, and the son of Noah, should divide the west half between them. Randolph to convey to James in fee the west half of the west half, and James, when he came of age, to convey to Randolph in fee the east half of the west half. An agreement in writing was drawn up between the parties, and Lake, who was then in possession, signed it; he was shortly after this to give up the possession of the land. Randolph did convey to James in fee the west half of the west half. James has never conveyed to Randolph the east half of the west half, which is the subject of this action. Randolph, on the 1st of October, 1847, conveyed the east half of the west half, his own portion by the agreement, to D. Roblin in fee, in trust, and Roblin and Randolph, on the 23rd of January, 1848, conveyed this same portion to C. H. Miller in fee. Miller entered into possession in 1849 when Lake left, by putting in one Evans as his tenant. In August, 1855, Miller sold to Allan McPherson Fraser, one of the plaintiffs. He sold to Fralick in December, 1860. He mortgaged back to his vendor, and he assigned the mortgage to Stevenson, the other plaintiff.

The facts are also set out in the case of *Fraser v. Fralick et al.*, in 21st Q. B. U. C. 343, relating to this same land.

This case was argued last Term by *S. Richards*, Q.C., for the plaintiffs, and *R. A. Harrison* for the defendants. The following authorities were cited for the plaintiffs: *Nicholson v. Dillabough*, 21st Q. B. U. C. 591; *Doe dem Carter v. Barnard*, 13 Q. B. 945; *Doe dem Goody v. Carter*, 9 Q. B. 863, U. C. Consol. Stat. ch. 88. For the defendant *Doe dem Ausman v. Minthorne*, 3 Q. B. U. C. 423, 427, 428; *Moran v. Jessup*, 15 Q. B. U. C. 612; *Brassington v. Llewellyn*, 27 L. J. Exch. 297, U. C. Consol. Stat. ch. 88, sec. 15; *Doe dem Curzon v. Edmonds*, 6 M. & W. 295; *Morrell v. Frith*, 3 M. & W. 402; *Doe dem Perry v. Henderson*, 3 Q. B. U. C. 486; *Doe dem Dunlop v. Servos*, 5 Q. B. U. C. 284; *Doe dem Burr v. Denison*, 8 Q. B. U. C. 185, 610; *Taylor on*

Evidence, sec. 298 ; *Alcock v. The Royal Exchange*, 13 Q. B. 292 ; *Williams v. Davies*, 1 Cr. & M. 464 ; S. C. 3 Tyr. 383.

ADAM WILSON, J.—The plaintiffs represent the right of Isaac Fraser, and desire to maintain the compromise of 1847, by which the children of Isaac and Noah were to divide the hundred acres between them. The plaintiffs are compelled to rely on the title of Isaac, because James, the son of Noah, has never given the deed to Randolph, which it was agreed he should give when he came of age, and which was the only consideration for Randolph giving up the fifty acres which he did convey to James in fulfillment of the bargain. If the plaintiffs are entitled to recover in this action, it will be manifest that James has really obtained a gift of the fifty acres from Randolph to which he had no kind of claim whatever in law. If the plaintiffs must fail in this action it must either be because Isaac had reconveyed the land to his father, which the jury have expressly negatived, or because Randolph has dealt more considerately with Noah's wife, his own aunt, and her child, his cousin, than he ought to have done, and the indulgence he has shewn to them is now sought to be repaid to him by the answer of the Statute of Limitations.

It cannot therefore be a matter of surprise that we should readily adopt the finding of the jury in favour of Isaac's title being still a subsisting title at the time of his death, and as such descending upon Randolph his son, and therefore available to the present plaintiff, unless Randolph, and those claiming under him, have forfeited their rights by lapse of time. We begin therefore with the fact that Isaac died seised in fee of this land, which disposes of the objection to the seals of his deed being removed, and to the allegation that he reconveyed the land to his father.

It is quite clear from the evidence that a deed was made by Abraham to Isaac, and that Isaac went into possession of the land, built upon it and lived there for several years, all of which acts are only consistent with his having had a valid title from his father. If therefore the title once passed, it can never be divested by any act of cancellation or destruction of the deed, for it is not the deed which maintains the title, the

deed has already answered its purpose by the transfer which it has effected, and it is from thenceforth only evidence, but not the only evidence, of that title which has passed and which now subsists independently of it.

The remaining objections to the plaintiffs recovery are :

1st. The Statute of Limitations.

2nd. That Randolph Fraser's deed is void by the statutes against maintenance.

3rd. That Miller's deed to Fraser is only a quit claim and had no precedent estate upon which to operate.

4th. That the deed from Fraser to Stevenson is void on the ground of erasure.

5th. That improper evidence was received, and

6th. The misdirection of the learned judge.

The question, as to the length of possession, is purely a question of fact, and although stated as a ground of nonsuit, certainly cannot be relied on for such purpose.

If Isaac left the land for Adolphustown in the spring of 1828, it is admitted the statute does not apply, because Randolph brought his ejectment sometime before June, 1847, for his declaration is entitled " Hilary Term, 10 Vic.;" but if he left in the spring of 1827, as the defendant says, then the ejectment was commenced after the statutory title was complete against him, as it is argued by the defendant, and all that took place after that event could not revive or re-establish his title as against James, the son of Noah, who was then an infant, and was in fact no party to any arrangement or compromise.

The plaintiffs dispute the defendants' conclusion, because they say that even if it be conceded that Isaac left in 1827, his father Abraham entered, not adversely in any respect, but as a caretaker only during Isaac's absence, and with Isaac's consent, and therefore being tenant at will the statute did not begin to run against Isaac until " the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined," which will still bring the period down to the spring of 1828, from which the statute is to begin to operate, and which is still a shorter period than twenty years before the ejectment was begun. It

may or may not be the fact that Abraham entered adversely, or is to be treated as a tenant at will, but it is a fact depending upon the evidence altogether, and this evidence, we think, greatly preponderates in favour of the father not having disseised his son or conducted himself as a trespasser towards him.

Whether Isaac left in 1827 or in 1828 becomes, in this view, quite immaterial; but if we had been pressed with the application of the statute against Isaac's title, upon the facts upon which the defendant has based his case, we should still have been unable to resolve this question in his favour, because Randolph, the heir-at-law of Isaac, who is all along presumed by the defendant to have been disseised or dispossessed by his grandfather, was brought by him in the early part of the year 1829, from Colborne to the grandfather's own house, and put as it were into possession of this very farm, upon which he lived, so far as we can tell, until the deed was made by Abraham to Noah, in the year 1839.

It may be if Abraham did intend to keep this land as his own, that he did not mean to put Randolph in possession of it by merely taking him to his own home; but on the other hand how can it be said that Randolph was ever out of possession of the land at any time during all the time he was actually living upon it, between 1829 and 1839, "for where two men are in possession, the law will adjudge it in him that hath the right." *Reading v. Roystin*, Salk. 423; Lord Raymond, 829 S. C. We are of opinion therefore that in no way can the Statute of Limitations prevail against the title of Isaac or of Randolph, and more particularly as all the period prior to the passing of our Real Property Act, 4 Wm. IV., ch. 1, must be determined by the old law as it prevailed with respect to *adverse possession*, when it was difficult to take any cases, between relations particularly, out of its comprehensive reach, which were not accompanied by an actual ouster of the true owner.

It is argued then by the defendant that the deed which Randolph Fraser made in January, 1848, is void, because it was made when Lake was in the possession of the land adversely to Randolph, so that it was then the sale of a disputed title. The facts we think shew that there is no ground for this objection.

In 1847, the ejectment was brought by Randolph against Lake. Lake consented to a verdict against himself; and agreed then, by the writing which he executed, to give up the possession of the land when he got his crops off at the end of the year 1848. He had thus by the verdict and by the writing acknowledged Randolph's title, and it was not until after the verdict and acknowledgment that Randolph sold the 50 acres to Miller, which by the compromise were to belong to himself. There was therefore no disputed title at such time, and the possession of Lake was then the possession of Randolph.

Then it is said that Miller's deed to Allan McPherson Fraser is inoperative, because it is only a quit claim, and the releassee had no precedent estate upon which the quit claim could operate. This is quite a mistake in fact, for the conveyance, which is a deed poll, contains the operative words "bargain, sell, assign, and quit claim."

Now the word assign is quite sufficient to pass the fee of itself. In 2 Bl. Com. 327, (3rd Edn.), it is said, "An assignment is properly a transfer or making over to another of the right one has in any estate, but it is usually applied to an estate for life or years." 4 Cruise, 98, is to the same effect. It is not therefore necessary to say what effect if any could be given to a deed poll as a deed of bargain and sale; for it is not necessary to treat this as a bargain and sale, although the operative words bargain and sell, it would seem, may be treated as a grant. *Haggerston v. Hanbury*, 5 B. & C. 101; 2 Saund. 97 n(2); *Nicholson v. Dillabough*, 21 Q. B. U. C. 591.

It is then argued that the assignment of mortgage from Allan McPherson Fraser to Stevenson is void on the ground of erasure. The erasure it appears consists in some word, apparently intended for January, being obliterated, and February written at full length, not above it, but after it, as if it were a correction which was made on the spot and in the same handwriting as the rest of the instrument.

The jury must have been satisfied that this correction was made before execution; but even if it had been made afterwards, it may not be such an alteration as would avoid the deed, for a deed takes effect from its delivery and not from its date.

We see no ground to suspect the genuineness of this document, nor of its having been altered after it was delivered. Nor does it appear there was any object to be gained by making this alteration. If the alteration were made before the assignment was executed, the deed is unquestionably valid. If it were made afterwards, the estate once passed is not thereby divested. Doe dem. Beauland v. Hirst, 3 Stark. 60, and note.

The defendant excepts then to the admission by the learned judge of the evidence of George H. Detlor, by way of reply to the defendant's case, contending that this further evidence was only to strengthen the plaintiff's own previous case, and was not adduced to repel a new case or new matter set up by the defendant; and to the admission of his evidence [even if otherwise admissible], founded only upon an entry in a book not made at the time, and of which he cannot speak, otherwise than from such entry.

The notes of the trial state this part of the case in the following words:

"Mr. O'Reilly proposes to shew [by Mr. Detlor, who married a sister of Isaac's wife] when Mrs. Isaac died. The witness says he has a book, in which he makes entries of facts as they occur, as soon after as convenient. He was at the funeral of Isaac's wife, had not the book with him, but on his return home [to Kingston] he made the entry, the next day he supposes, as this is his habit; he does not speak from his recollection except as to the entry, but from this he speaks with confidence.

"Mr. Harrison objects that the witness cannot use the memorandum unless it was made at the very time.

"Then as to receiving evidence of the death of Isaac's wife, it is objected it ought not to be received because her death was brought out in the cross-examination of the defendants' witnesses by Mr. O'Reilly, and because it is to uphold the plaintiffs' case in the first instance, not as rebutting any of the defendants' evidence. I allow the evidence giving defendant leave to move against the verdict, if it should be against him.

"Mrs. Isaac Fraser was buried 9th October, 1828. I was

at her funeral, at Adolphustown, on that day, as I recollect from my book only. I returned home the next day, as my book shews."

It is stated in Taylor on Evidence, 1 ed. 933, and his statement is fully borne out by the authorities, that a witness will be allowed to refresh his memory "where the writing has been made or its accuracy recognized at the time of the fact in question, or at farthest so recently afterwards as to render it probable that the memory of the witness had not then become defective." Where therefore the writing had not been made until some weeks after the event, and where the witness had reason to believe he would be called to give evidence, the witness was not allowed to refer to his notes.

In another case, the judge said the witness could not refer to a memorandum unless it was made near the time.

In a still later case, a witness was allowed to refer to depositions made by him in bankruptcy within a fortnight after the transaction took place, because they were made near the time when the matters occurred and when the facts were fresh in his memory. *Wood v. Cooper*, 1 C. & K. 645; *Whitfield v. Aland*, 2 C. & K. 1015.

In the present case, Detlor, the witness, had gone from Kingston to Adolphustown for the express purpose of attending his sister-in-law's funeral. He returned to Kingston the day after the funeral. He entered the fact and time of the death on the day of his return, in a diary which he was in the habit of keeping, not with a view to any litigation, or for any other purpose than simply to preserve a record of events, which it was his practice to note.

The original entry was produced by the witness at the trial. It was in his own handwriting. It referred to an event in which he had an especial interest as a relative. He made the entry the day after the funeral, at a time when the fact was fresh in his memory, and when he had no other object in making it than to keep a record of the fact, and very undesignedly on his part he is called upon to produce this memorandum, thirty-five years after the occurrence. Upon what rule or principle of law then or reason can this entry be rejected as an aid to the writer's memory? The authorities

are certainly in favour of its admissibility, and it might be felt to be almost a reproach if it were not so.

If this entry should not have been admitted, it probably would have made no difference in our opinion, because the fact it was produced to support, namely, the year when Isaac left his farm, whether in 1827 or 1828, is sufficiently proved by other means; and from what we have already said, it is not we think of any consequence in which year it was.

But it is also contended that Detlor should not have been allowed to be called in reply at all. We do not think, from the view we have expressed already, that it is of any consequence to discuss this objection; although if it had been necessary to do so, we do not see how we could say when the evidence itself was admissible, and the objection is only as to the time at which it was received that there should be a new trial; because this is a matter exclusively within the control and jurisdiction of the presiding judge, and with which the court has properly nothing to do. No doubt it is difficult at times to apply the rule rigidly, and at other times it would be almost a denial of justice to enforce it. Each case must rest on its own special circumstances, and we think it better not to discuss the general rule when the particular case can lead to no practical result. We may refer to the cases of *Wright v. Willcox*, 9 C. B. 650; and *Cope v. Thames Haven Dock Co.*, 2 C. & K. 757; in addition to those which were cited during the argument.

Another objection under this head is that the record in the ejectment suit of 1847 was allowed to be put in by the plaintiffs.

It was certainly evidence of the fact that Randolph did bring an ejectment for the recovery of this land in 1847, as then asserting his rights; and that a verdict was rendered for him by consent of the then tenant; and that upon this verdict the arrangement was made by which Lake, the tenant, became tenant in fact, at a nominal rent to Randolph; and that from these facts the deed which Randolph made to Miller, in January, 1848, was therefore a deed not impeachable on the ground of maintenance.

It is certainly no evidence against these defendants as

establishing any title in Randolph, but it is evidence at all events that Randolph claimed the land, and procured such an interest in the land by means of it that he could convey effectually, without the imputation of selling a disputed title; and if it were admissible for such purposes, the objection taken at the trial is not sustainable, "that it is not evidence in this cause for any purpose."

The last objection is for misdirection, because the learned judge directed the jury to consider in relation to the question of the Statute of Limitations the fact that Randolph Fraser had a right of entry on the land before he made an entry.

It is not very obvious what this means. If it mean that Randolph Fraser had no right to enter, that is no title, because Isaac had either reconveyed the land to Abraham or Randolph had lost his estate by lapse of time, until and only by means of the arrangement he made with Lake; the learned judge could not say that, for that was the principal question which the jury had to decide; nor could he have said, on the other hand, that Randolph had a right of entry, for that would have been to determine the very thing yet to be determined; and we do not think that his charge can in this respect be said to assume that such a right of entry did exist in Randolph; for although the 5th and 6th questions left to the jury may be sought to be so construed, the whole charge must fairly be taken together, and when this is done it is perfectly clear the jury could not have understood the judge as laying down that Randolph before he did enter had the right of entry. The 5th and 6th questions are, "when was the right to the possession given up to Randolph or Roblin or those claiming under them," and "when was the actual possession given up;" and the objection taken at the time to this portion of the charge was "that no distinction should have been made between the right to possession and the giving up of possession;" now the jury were expressly told "if they found Isaac and his heirs out of possession for 20 years, Abraham claiming the land as his own when Isaac left, then the plaintiffs cannot recover, for the statute ran when Abraham claimed the land as his own in Isaac's life time."

It is impossible the jury could have understood the learned

judge as deciding anything whatever as to Isaac's title or Randolph's right. He left the whole case, fully, fairly and satisfactorily; to them, and this is assuming that the questions of the learned judge have been correctly stated in the rule, which does not appear to be so, for he nowhere directed the jury to consider, in relation to the Statute of Limitations, the fact that Randolph had a right to enter before he did enter. He directed them to say when the right to possession or the actual possession was given up.

The rule does not represent this or anything like it. But even if it did, we should not be disposed to take an isolated part of the charge and construe it, without reading it as we would all other language, by the aid of the connected, dependent and accompanying language.

We are of opinion that the rule should be discharged *in toto*; and we think that the parties should, as *Sir John Robinson* said on the former trial, already referred to, "abide by the amicable arrangement that was made in 1847," for by that arrangement, according to the finding of the jury, the defendant was the only gainer by the bounty of his cousin, whose title he now controverts.

Per cur.—Rule discharged.

CROOKS V. DICKSON.

Summons—Enlargement of—Stay of proceedings thereby.

Held, generally speaking, that a summons calling on a party to shew cause, operates as a stay of proceedings after it is returnable, and an enlargement thereof by consent of parties continues the stay.

This was an action of covenant to recover five years' rent of premises in the City of Toronto. The writ was issued on the 25th of February, 1862, and the declaration is entitled the 19th of April, 1862. The venue was laid in the county of Grey originally, but was afterwards changed to the county of the City of Toronto. The defendant filed a plea by way of equitable defence, and demurrers arose out of the pleadings which came before the court in Hilary Term last year. Since that time there have been applications to amend the pleadings, and out of one of these applications, and the taking of the

verdict before the amended pleadings were filed, this motion arose. It was made by *Crombie* during Michaelmas Term last and enlarged to this Term, when *R. P. Crooks* shewed cause, and *Crombie* and *Anderson* supported the rule. The rule was to shew cause why the verdict should not be set aside with costs, and a new trial had between the parties on the ground of irregularity, in this, that the record was entered for trial whilst the proceedings in the cause were stayed; or on the ground that the verdict was taken after an order had been made allowing the defendant to add to the pleadings a new rejoinder, and a reasonable time had not elapsed from the making of the order to tax and pay the costs of opposing the application for the order, and to add and serve the rejoinder; or why the verdict should not be set aside and a new trial had between the parties on such terms as to the court might seem meet, on the ground that the verdict was excessive, and on grounds disclosed in papers and affidavits filed.

From the affidavits filed it appeared that notice of trial was given and the record entered for trial at the spring assizes of last year, held in May last, at Owen Sound. A summons which had been obtained for allowing the defendant to amend his pleadings was enlarged, by consent of parties, before the presiding judge at Chambers in Osgoode Hall, until Monday the first day of June, then next, and it was ordered that the venue in the cause be changed from the county of Grey to the county of the City of Toronto, and that the costs of the day, excepting the witnesses' fees, should be costs in the cause. The order was dated at Owen Sound on 13th of May, 1863. The defendant did nothing under the order; and after notice of trial had been given for the last autumn assizes for the city of Toronto, on the 28th of October, a summons to add a rejoinder was taken out and served on plaintiff on the 29th, returnable the next day. This summons was, by consent of both parties, enlarged until Saturday, the 31st of October.

Mr. Crooks, in his affidavit, states that he told the defendant's attorney at the time the enlargement of the summons was spoken of, he would enter the record for trial.

On the 31st of October, Saturday, the summons was argued before Mr. Justice *Morrison* by the plaintiff, and Mr. *Crombie*

for defendant. The learned judge reserved his decision, and stated that as on the following Monday he was about leaving town, he would hand the order he made to the clerk in Chambers. On Monday, the 2nd of November, the order was obtained by the defendant's attorney, and served on the plaintiff's attorney the same day, by putting it under the door of his office, which was closed.

The order was that the defendant should have leave to plead the rejoinder referred to in the summons, on payment of the costs of opposing the order.

The commission day of the assizes for the county of the city of Toronto was on Thursday, the 29th of October, and it is said the record was entered on that day, after the enlargement of the summons, and whilst the same was pending. The assizes were opened on that day by the learned judge assigned to take them, and then they were adjourned until Monday, the second day of November, the day when the order was obtained, and served. On the second and third of November that court was presided over by the Chief Justice of Upper Canada. The record stood thirteen on the list, and the verdict was taken on the afternoon of the third day of November, the day on which the costs of opposing the order were taxed, in the absence of the defendant's attorney and counsel, and before the amended pleading had been filed or served. The damages were assessed at \$4339 90.

On Tuesday, the third of November, a clerk of the defendant's attorney called at the office of the plaintiff's attorney, who said he was making up the costs of opposing the order, and they met at Osgoode Hall and the master taxed the costs. The plaintiff's attorney took out an allocatur for the amount of the costs, but the clerk of defendant's attorney was not aware that a copy was served. The costs were taxed at £1 18s. 9d. on the 3rd of November, but were not paid before the verdict was taken, nor have they been paid since.

RICHARDS, C. J.—The defendant's counsel, on the argument, contended, as a matter of strict legal right, that as the plaintiff had enlarged his summons before the record was entered, such enlargement operated as a stay of proceedings, and

the subsequent entry of the record and proceedings afterwards were all irregular. As a general proposition a summons operates as a stay of proceedings after it is returnable, and if it is adjourned by consent the stay continues. In the case before us it evidently was not in the contemplation of the parties that the plaintiff should not enter his record, and Mr. Crooks states that he told Mr. Crombie he would enter the record. In the absence of any contradiction of this statement, or of any dissent expressed on the part of the defendant's attorney to Mr. Crooks' doing as he stated he would, we think we should be carrying the rule too far to hold that the plaintiff was not at liberty to enter the record, particularly as the defendant's attorney stated that he expected to try the case at those assizes, and had no intention of objecting to the record being entered thereat; his only object being to get the plea he had leave to file, placed on the record.

The case then comes to this, that on the day the costs of the amendment were taxed, whilst undoubtedly both parties expected those costs would be paid and the plea filed, the cause was taken as an undefended one. The exact hour of the taxation of the costs is not known. The verdict, from what we hear, was taken between two and four o'clock. The plaintiff's attorney, and the clerk of the defendant's attorney, attended at Osgoode Hall, and had the costs taxed. The offices there are not open until ten o'clock and parties are not usually there to do business when the office is open. If two hours are allowed for making out the bill of costs and having the same taxed, and getting the allocatur, it would bring the time down to about noon. Then if the verdict was taken at two o'clock, or even at four, without further notice to the defendant's attorney, whose office was within almost a stone's cast of the court house, it does seem like pressing the matter with unusual haste and sharpness. It is urged that the learned Chief Justice was insisting on business going on, and that in consequence of this pressure the case was taken. Still I think it was due to the apparently liberal manner in which the attorneys for the parties were and had been acting towards each other, that some little trouble should have been taken to let the defendant's attorney know the case was coming on. A constable might

have been sent to his office to notify him of what was being done, when it was well known he intended to defend the case, particularly when so large an amount was involved.

On the other hand there is no reason to doubt that the defendant's attorney well knew the case was entered for trial, and he ought to have known the presiding judge would have insisted that the business of the court should be proceeded with. He knew that as he had obtained leave to plead on terms of paying costs, the responsibility was cast on him of having these costs taxed and promptly paid, and after the assizes had commenced he ought to have used unusual diligence. There were probably from two to four hours after the costs were taxed, in which he appears to have done nothing towards paying these costs. Under all the circumstances we cannot say he is entirely free from blame.

Looking at the facts we do not think it right to allow this verdict to stand, and therefore the rule will be absolute to set it aside; and as to the costs of the trial and of this application, we think the most reasonable mode of disposing of the matter will be to let them be costs in the cause—the defendant to have until Tuesday next, inclusive, to pay the costs of the amendment already taxed, and to file and serve his added plea without prejudice to plaintiff giving notice of trial to-day for the next assizes.

Per cur.—Rule accordingly.

CRAWFORD V. BEARD ET AL.

Contract—To be performed in the United States—How payable—Greenbacks.

The defendants reside at Toronto, in Canada; and one of them when at Cleveland, or as plaintiff contends at Toronto, wrote to plaintiff, who resides in Cleveland, as to coal, to which letter the plaintiff replied and addressed his letter to the defendants at Toronto, agreeing to furnish coals at Cleveland at \$2 75 per ton.

Held, that the place where the money is payable governs the question as to how it is to be paid, and as the goods were to be delivered at Cleveland, it is to be presumed they were also to be paid for there on delivery, and that therefore plaintiff must accept American currency in payment thereof.

Plaintiff declared on the common money counts for goods sold, money lent, money paid, money had and received, interest, and the account stated. Damages three thousand

five hundred dollars. Writ issued on the 23rd of December, 1862. Special plea of never indebted, except as to goods sold and interest. And to so much of the declaration as alleges goods sold and delivered, and for interest, defendants say the goods sold were a quantity of coal, to wit, 724 tons, which were so sold and delivered to defendants under the agreement that the coal was to be delivered and accepted at Cleveland, in the United States of America; and by the contract the defendants agreed to pay, and plaintiff accept \$2 75 per ton, and \$1991 was the amount so payable to the plaintiff for the said 724 tons of coal, under the agreement, which said sum was due and payable, and by the contract was to be paid to said plaintiff at Cleveland in the said United States; and another quantity of coal, to wit, 285 tons, which was sold and delivered under another contract, whereby plaintiff agreed to deliver and defendants to accept said last mentioned coal at Cleveland aforesaid, and plaintiff agreed to accept and defendants to pay the sum of \$804 of lawful money of Canada for such coal, so delivered under the last mentioned contract, and defendants say the interest and forbearance of money in the declaration mentioned, is for interest and forbearance on the said sum of \$1991 and \$804, and there is due and owing therefor to plaintiff \$42 05 as such interest, and the defendants say except as to the said sum of \$1991 of lawful currency of the United States, which said sum is equal to \$1314 06 cents of lawful money of Canada, and the said sum of \$804 of lawful money of Canada, and the said sum of \$40 of lawful money of Upper Canada, making in all \$2152 of lawful money of Upper Canada, they were never indebted to the plaintiff; and the defendants bring into court the said sum of \$2153 06 of lawful money of Canada, and say that is enough to satisfy the claim of the plaintiff in respect of the matters therein pleaded to.

The plaintiff takes issue on the several pleas of the defendants.

The cause was taken down to trial before the present Chief Justice of Upper Canada, at the last spring assizes for the counties of York and Peel.

The contract was contained in a letter put in dated the 30th of July, 1862, and the reply to it.

A gentleman called as a witness said he was an exchange broker, residing in Toronto, and that he could have bought a draft on New York with Canada money at 35 per cent. discount. That draft would be payable in New York in treasury notes, for it would have been drawn payable in current funds. In Buffalo or Cleveland Canada money would probably have been 2 per cent. less than gold, which might have made the treasury notes 30 or 35 per cent. discount. On cross-examination he stated the treasury notes are the current money of the United States. There are gold coins of \$1, \$2½, \$3, \$5, \$10 and \$20, and there was also a silver currency. Canadian gold and American gold were at par. He only knew of treasury notes by custom of dealing, he had received and paid them out, and remitted them to New York; for \$1000 in gold paid him here, the witness would give a draft on New York taking the gold at 54 per cent. premium. If he sold a draft on New York payable in gold, he would charge one per cent. premium on it, receiving gold or Canada notes here. If a draft payable at sight were drawn at Cleveland, payable here, the witness would give \$1000 for it, if payable in our money, charging the usual discount.

A professional gentleman, a lawyer in the United States, stated that by an act of Congress, passed on the 25th of February, 1862, the secretary of the treasury was authorised to issue one hundred and fifty millions in treasury notes, and a similar sum by an act of July. These notes were a legal tender except in payment of customs dues and interest on government bonds and notes—(it was admitted that for goods sold and delivered in the United States, treasury notes are a good legal tender). He thought the act constitutional. The copy of the clause, in referring to these bonds, he handed in was as follows: "and they shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid." He added, treasury notes are lawful money for purchases for cash. But if he took \$1000 in treasury notes to a broker he could not get \$1000 in gold. They are in law lawful money for all purposes except what are excepted, for any other purpose they are legal currency.

Another witness, a resident of Toronto, stated that he was in New York in December last, that he was offered for Canada money within $\frac{1}{2}$ per cent. of what they would give for gold. A bill drawn in New York on Canada would be, if paid in gold, $\frac{1}{2}$ per cent discount. He called treasury notes currency of the United States.

There was a verdict rendered for the plaintiff for \$685 with leave reserved to move to reduce it on the evidence, the court to draw conclusions of fact therefrom, or order a verdict for the defendants.

In Easter Term last *Crombie* moved a rule *nisi* to enter a verdict for the defendants, pursuant to leave reserved, on the ground that from the evidence given at the trial the defendants were entitled in law to a verdict.

This rule was enlarged by consent to Trinity Term.

During the Term *Eccles*, Q.C., shewed cause, and contended that the contract did not necessarily create a debt payable in Cleveland; that the letter being written by the defendants in Canada was creating a debt here as far as they were concerned; that the contract was to pay in money not in treasury notes; that the coin of the United States remains the same as it was, and that what the act of Congress permits is that people may tender these greenbacks, as they are called, in payment of their debts, and that we, and our courts, are not bound to take the equivalent as a tender here. He referred to Story on the Conflict of Laws, secs. 336 and 308 to 314 inclusive.

Anderson, contra. The *lex loci* governs as to the value of the money in which the demand is to be paid. The contract was to deliver to defendants in Cleveland a certain number of tons of coal at a certain price, and arose out of a letter which plaintiff received there and replied to from that place. The question was simply what were the damages the plaintiff sustained by the breach of defendants' contract. Whatever sum would put him in the same situation as he would have been in if the contract had been performed is all he can ask as damages from a court or jury here. It is clear defendants could have paid in greenbacks at a large discount from Canada money, when the debt became due, and all that plaintiff can now ask them to give him is what was then the value of the

debt in greenbacks as compared with Canada money, and the interest. He referred to *Scott v. Bevan*, 2 B. & Ald. 78; *Don v. Lippman*, 2 Tudor's Leading Cases on Mercantile Law, 244; *Westlake on Private International Law*, sec. 232.

ADAM WILSON, J.—It appears the plaintiff is a resident at Cleveland, in the United States, and the defendants are residents of Toronto, in this province.

The defendants, on the 29th of July, wrote a letter to the plaintiff, addressed to him at Cleveland, proposing to take from him certain quantities of coal at certain prices. It is not quite agreed where this letter was written, the defendants say at Cleveland, by one of them while there for the purpose of making a bargain. The plaintiff does not admit this; from which he leaves it to be inferred that it was written by the defendants at their residence and place of business in Toronto. The letter itself has, by some means, been lost or mislaid since the trial.

The plaintiff, on the 30th of July, in Cleveland, answered the defendants letter addressed to them at Toronto, in the following words:

“I will let you have the 100 tons, to be delivered here free on board at \$2 75 per ton, as I am anxious to sell you, even by so doing I should disappoint some of my other customers. I would like you to send for it in as small cargoes as convenient for you, and not more than one vessel at a time, as it sometimes comes in very slow. Please advise me when you will probably send for first cargo, also when your vessel leaves your place to come here.”

Nothing seems to have been expressly said of the time when or the place where the money was to be paid.

This then is the case of a contract made in one country, which is to be performed in another, if the defendants' letter were written here; or the case of a contract made entirely in one country, and that county the United States, if the defendants' letter were written at Cleveland.

In the former case the rule is that the place where the money is payable is the one which is applicable to the question, and as the goods were deliverable at Cleveland, and no

express provision was made for payment, the presumption is that the goods were to be paid for on delivery, and therefore at Cleveland. Story's Conflict of Laws, sec. 280.

In such a case then, when a suit is brought, the plaintiff should recover such a sum in the currency of that country, as will approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par and not by the nominal par of exchange. Story's Conflict of Laws, sec. 309. The general rule that the debtor must follow his creditor to discharge his debt has much bearing in determining the place of payment.

These defendants could have paid this debt in Cleveland in the funds of the United States at their nominal and legal value there, for it is there their money was payable.

If the contract had been that the defendants should pay the plaintiff in Canada or in London, the defendants could no more have compelled the plaintiff to take payment in Cleveland, as if the debt had been payable there, without indemnifying the plaintiff against this breach of contract in paying the plaintiff in Canadian or English funds according to the value of money in these countries, than they could with impunity have violated any other of the conditions of the contract. *Suse v. Pompe*, 8 C. B. N. S. 538. If, however, the defendants' letter was written in Cleveland, then the entire contract was made there, for the posting of the plaintiff's letter of acceptance concluded the bargain. *Dunlop v. Higgins*, 12 Jur. 295; *Duncan v. Topham*, 8 C. B. 225; *Scott v. Pilkington*, 2 B. & S. 11. And as performance, and payment as a consequence, were to be there also, there can be no doubt that payment made in the funds of that country, or in their equivalent if made in a foreign country, will be a due performance of the contract. *Gibbs v. Fremont*, 9 Exch. 25. If a depreciation takes place in the currency between the making and the performance of the contract, the debtor may pay the amount according to the value which the currency bears when the debt falls due. Story, sec. 313 a.; *Pilkington v. The Commissioners for Claims*, 2 Knapp. Rep. 18. A depreciation can scarcely be said to exist in this particular case, for in the country in which the money is payable, a particular currency

of that country, the treasury notes, are declared by the legislative authority to be lawful money, and a legal tender in payment of all debts, except as before stated.

In either view of the facts of this case we think the defendants are entitled to succeed. The rule will therefore be that the postea be delivered to the defendants.

Per cur.—Postea to defendants.

STYLES V. TAYLOR.

Trespass—Deed of B. & S.—Conventional line—Purchaser may recover possession within twenty years after date of deed.

Held, that when a party, by deed, has granted a piece of land to another, though he may retain possession of part of the land granted, and though the grantee may suppose his grant does not cover such part, yet if the deed does actually cover the land, the grantee is entitled to it, if he asserts his right within twenty years from the date of the grant.

This was an action of trespass *qu. cl. fre.* to a small piece of land in the township of Hamilton, in the county of Northumberland. The defendant justified as servant of the school trustees of school section No. 5, in the township of Hamilton.

The cause was taken down for trial before Mr. Justice Morrison at the last autumn assizes held at Cobourg.

The point raised at the trial seems to have been this—the father of the defendant in 1841 or 1842 sold to the district council of the Newcastle district a small piece of land, one-twentieth of an acre, part of lot No. 24, in the second concession of the township of Hamilton, as the site of a school house. It was taken possession of, and has been held by the school trustees of the school section No. 5 ever since. The conveyance of a piece of land described by metes and bounds, was made by defendant's father in 1849 to the district council. The land, as described in that deed by a survey recently made, covers part of the ground enclosed by plaintiff's fence; and the school house itself, instead of being on the lot owned by plaintiff and his father, is on the road. Defendant, with a view of asserting the right of the trustees to the land, as covered by the deed, according to its description, put some stones on plaintiff's enclosure, but within the area of the land in the deed from plaintiff's father.

It was contended for plaintiff that the parties having, at the time of giving the land, agreed as to the boundaries; the school house being erected thereon at the time; the land being fenced; and the deed given to cover that particular piece of land, that defendant could not set up at this period the new survey, with a view of altering boundaries so long held as the settled limits between the school lot and plaintiff's land.

The defendant's counsel objected to this view, and contended he, defendant, had a right to shew that the land set out was not covered by the deed, but that it covered the land trespassed on. The learned judge directed for the plaintiff on these points.

In Michaelmas Term *C. S. Patterson* obtained a rule *nisi* to set aside the verdict for misdirection. The rule was enlarged to Hilary Term last, when *Galt*, Q. C., shewed cause and contended that the land having been in the occupation of the school trustees when the deed was made, it must be presumed it was intended to cover the land they occupied, and that after so long an occupation defendant could not now be allowed to set up that the deed covered any other land. *Dunn et al. v. Turner*, 3 U. C. C. P. 104. *Bell v. Howard*, 6 U. C. C. P. 292; *Dennison v. Chew*, 5 U. C. O. S. 161.

C. S. Patterson, contra, contended that the grantees of defendant's father, and those who claim under them, have a right to the land mentioned in that deed.

RICHARDS, C. J.—There can be no doubt, as a general rule, if parties occupy up to, and keep possession on either side of a conventional line for twenty years or more, that such line becomes the boundary between the parties who so occupy. But if one of the parties by deed, within twenty years, has granted a piece of land to the other, though he may retain possession of part of the land, and though the other party may suppose that his grant does not cover such part, yet if the deed does actually cover the land the grantee claims, he is entitled to it if he asserts his right within twenty years of the date of the grant. If there is any mistake in the deed; if it covers more or other land than it was in the contemplation of the parties it should, the conveyance may be reformed in a court of

equity, but as long as the conveyance is an existing deed, the land covered by it passes to the grantee.

It appears to me that at the trial the fact must have been overlooked that the conveyance of the land was made within twenty years, and therefore the mistake has arisen. If the point argued is the one on which the case went off, I think the ruling of the learned judge was wrong, and there must be a new trial without costs.

It may be necessary to add that we have not considered what the effect of the deed itself is as to the parties who can properly take possession of the property conveyed under it, as that point was not raised or discussed by the plaintiff's counsel on the argument.

Per cur.—Rule absolute for a new trial without costs.

MCCREARY V. BETTIS.

Malicious prosecution—Embezzlement—Nonsuit.

Action against defendant for charging plaintiff before a justice of the peace with embezzlement, without reasonable and probable cause. On the trial of this case the affidavit by which the information was laid, the warrant and arrest thereunder were proved. Also evidence was given that the defendant had preferred a charge against plaintiff before the grand jury, and that they had ignored the bill. On this evidence the plaintiff was nonsuited. Upon motion to set aside the nonsuit.

Held, that the ignoring of the bill by the grand jury was *some* evidence of *want of reasonable and probable cause*, and the nonsuit was set aside and a new trial ordered without costs.

Action for malicious prosecution in going before a justice of the peace, and charging plaintiff with embezzlement without reasonable or probable cause. The second count was in trespass. The case now turns upon this; after proving the affidavit, warrant, arrest, commitment and imprisonment of plaintiff under the warrant, and also proving that the defendant went before the grand jury and preferred the charge against plaintiff, and that the grand jury ignored the bill; the plaintiff contended this was evidence of a want of reasonable or probable cause for making the charge. The defendant's counsel contended it was not. The learned judge agreed with the defendant's counsel, and nonsuited the plaintiff. In Michaelmas Term the plaintiff obtained a rule *nisi* to set aside

the nonsuit, which was enlarged until Hilary Term last, when *C. S. Patterson* shewed cause. The rule was also moved on another ground, on affidavits, and the affidavits in reply completely answered the case set up by plaintiff in that respect, so that they are not now further referred to. There was also some discussion as to the count in trespass which it is not necessary to discuss, as it is not pretended there was but the one arrest or substantial cause of action. *Patterson* contended the question of reasonable and probable cause was for the judge, and not for the jury, and that the mere fact that the grand jury ignored the bill is no evidence of want of reasonable and probable cause. He referred to Taylor on Evidence, 3 Ed. p. 37, sec. 26; *Byne v. Moore*, 5 Taunton, 187; *Nicholson v. Coghill*, 4 B. & C. 21.

Diamond, contra, contended that slight evidence of want of reasonable and probable cause was sufficient. He referred to Roscoe's Evidence, p. 580; and the cases there referred to; *Taylor v. Willans*, 2 B. & Ad. 857, and the cases above noted.

RICHARDS, C. J.—In *Nicholson v. Coghill*, 4 B. & C. 22, *Holroyd, J.*, said, in actions for a malicious prosecution it has been held that evidence of the bill having been thrown out by the grand jury is sufficient to warrant an inference of the absence of probable cause. *Bayley, J.*, referred to Buller's, *nisi prius* 14, as shewing the necessity of proving reasonable and probable cause in some cases though the indictment be found by the grand jury. *Byne v. Moore*, 5 Taunton, 187, was an action for a malicious prosecution in charging plaintiff with a misdemeanor, in which plaintiff merely proved that the indictment was ignored, on which he was nonsuited. In arguing that case for the defendant, Shepherd, *Sergeant*, referred to *Savil v. Roberts*, 1 Salk. 13, as follows: "Secondly, that if *ignoramus* be returned where the indictment contains scandal, and where the defendant has been in prison, the action lies; but if the indictment contain no scandal, and there be no imprisonment, there is not a sufficient ground for the action;" as there was no evidence the party was imprisoned and the indictment was for a misdemeanor, the court sustained the nonsuit. Lord *Tenterden*, in *Taylor v. Willans*, 2 Bar. & Adol. 857,

says "the want of probable cause is, in some degree, a negative, and the plaintiff can only be called upon to give some slight evidence of such want." In *Willans v. Taylor*, 6 Bing. 183, the defendant presented two bills of indictment against the plaintiff, but did not appear himself before the grand jury, and the bills were ignored. He presented a third on his own testimony and the bill was found. He kept this prosecution suspended for three years, till plaintiff, taking the record down to trial, defendant declined to appear as a witness although in court, and called on. Plaintiff was acquitted. Held sufficient *prima facie* evidence of the want of reasonable and probable cause.

The case quoted from *Salkeld* is an express authority that in this case, when the plaintiff was imprisoned, the ignoring of the bill by the grand jury was some evidence of want of reasonable and probable cause. The dicta of the judges which I have quoted are in accordance with the general sentiment of the profession, that the ignoring of the bill by the grand jury, on a charge of felony, when the defendant himself was the prosecutor and went before the jury, was evidence of want of reasonable and probable cause in an action for a malicious arrest and prosecution.

This evidence is very slight, and may be rebutted by circumstances equally slight, but I cannot say it is not some evidence, and as the learned judge nonsuited the plaintiff after he had given evidence of the ignoring of the bill, I think the nonsuit ought to be set aside. The rule will be absolute to set aside the nonsuit without costs.

Per cur.—Rule absolute.

McKENZIE V. SOMMERS.

Promissory note—Award—Indebtedness under—Set off.

1st. Count of declaration on a promissory note for \$400.

2nd. For the indebtedness of defendant in the sum of \$85 18, under an award founded on a submission leaving all matters in difference, whether partnership or otherwise, to arbitration.

Pleas—1st. payment.

2nd. Set off on common counts.

A verdict was rendered for plaintiff at the trial for \$673 93. On motion to set aside the verdict on the grounds, 1st. That the arbitrators exceeded their authority in making their award. 2nd. That since the making of said award, money had been received by plaintiff to defendant's use.

Held, that as no defence had been set up to the award at the trial, and as no action has been taken to set aside the award, the defendant could not now set up such a defence; and if moneys have been received by plaintiff to defendant's use, as alleged by defendant, since the making of the award, it was open to defendant on the pleadings to have shewn same at the trial, and he is not, therefore, entitled to have another opportunity of setting up that defence.

The writ in this case was issued on the 26th of August, 1859.

The first count of the declaration was on a joint and several promissory note for \$400, dated 11th August, 1858, made by defendant and one John Summers, payable to the plaintiff one year after date, with interest. The second count alleged defendant's indebtedness in the sum of eighty-five dollars and eighteen cents on an umpirage made by William McMillan, by virtue of a submission made by the plaintiff and the defendant to the award of Alexander McKenzie and Gardner Elwood, of and concerning all matters in difference then depending between them, and thereby empowering the arbitrators, in case they should not agree in making such award, to appoint a third person to award on the matters in difference; and they not agreeing, appointed one McMillan as umpire, and by virtue of which reference McMillan awarded that the defendant should pay to the plaintiff eighty-five dollars and eighteen cents at a day now past. Then the common counts and account stated followed, concluding with a claim of eight hundred dollars.

The defendant on the 10th of October, 1859, pleaded
1st. Payment.

2nd. Set off on the common counts on which issue was joined on 8th October, 1859.

The cause was taken down to trial at the Fall Assizes of 1863, for the County of Middlesex, before the *Chief Justice* of Upper Canada, when a verdict was rendered for the plaintiff for the amount of the note and interest, the amount mentioned in the award, with interest, and \$38 in addition for half the arbitrators' fees, making in the whole \$673 93. There was no defence offered as to the award. A witness was sworn, who stated he was present when defendant gave a mortgage to the plaintiff. It is probable the learned Chief Justice refused to allow the defendant to go into evidence to shew that the promissory note was merged in the mortgage.

The award which was filed at the trial, and as to which no defence was then offered, is dated the 5th January, 1859, and was executed by William McMillan, as umpire. It recites that plaintiff and defendant, copartners, had mutually entered into bonds on 23rd December, 1858, conditioned to keep the award of Alexander McKenzie and Gardner Elwood, arbitrators indifferently chosen by the parties, of and concerning all manner of actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, * * * quarrels, controversies, trespasses, damages, or demands whatsoever, both at law and equity, committed or depending by or between the said parties, so as the award should be made before the 1st January, 1859; but if the arbitrators did not make their award before that time, the parties were to keep the award of such person as should be chosen by the arbitrators, so as the umpire should make his award or umpirage of and concerning the same on or before the 5th January, 1859. The award then recited that McKenzie and Elwood, having met upon the reference, did not make the award by the time limited, and chose McMillan as umpire, and he having taken on himself the burthen of the arbitration, and having inspected the copartnership books of account, and having duly considered the allegations, vouchers, proofs and witnesses of the parties, and finding there was owing to the partnership \$138 96, awarded that the proceeds of the same should be paid to plaintiff, with the exception of an account against Thomas Stodard, amounting to \$62 37, which defendant was to receive when collected.

He further ordered that defendant should have the exclusive property in the hogs at the mill, with the exception of four bought by plaintiff, which he, plaintiff, was to keep.

He further awarded that the sum of \$85 18 be paid to plaintiff by defendant in three months from the date of the award.

He also awarded that the promissory note dated about the 11th August then last, payable one year after the date be paid to the plaintiff by defendant, according to the tenor and effect thereof; and also that the mortgage given by defendant to

plaintiff, dated the 13th November, 1858, he paid according to the terms therein mentioned. And he awarded lastly that the expenses of the reference and of his award, which he adjudged on the whole at £19, should be borne and paid by the parties in equal moieties.

In Michaelmas Term last a rule was obtained on the defendant's behalf, calling on the plaintiff to shew cause why a new trial should not be had between the parties on such terms as to the court might seem meet, on the ground that the verdict was unjust; and of surprise, and on grounds disclosed in the affidavits filed, and why defendant should not be at liberty to add pleas. This rule was enlarged to Hilary Term last. *Alex. MacNabb* shewed cause and filed affidavits, and contended that he had completely answered the plaintiff's case. He referred to *Hurrell et al v. Simpson*, 22 U. C. Q. B., 65.

Becher, Q. C., contra, supported the rule, and offered to pay the amount of the verdict into court, and as to the pleadings referred to *Bullen & Leak's Precedents*, p. 422-3 and 550.

On moving the rule the defendant's affidavit was filed, in which he stated that subsequent to giving the note sued on, it was agreed between him and plaintiff that they should go into business as copartners and for that purpose plaintiff agreed to advance him sufficient to pay off all debts which he then owed including the note to him, plaintiff, and to take a mortgage on defendant's mill to secure the payment of the same. That in pursuance of the agreement he made the mortgage for \$1300 to plaintiff, who then paid William Blue, one of the creditors, \$320; Charles G. Moore, another of his creditors, \$500, and retained \$400 in payment of the note, and \$50 for money which defendant had borrowed of him. That plaintiff had since assigned the mortgage to John S. Mason, and he had paid the principal portion of the same to Mason. That in the hurry of having the matter settled he forgot to get the note from plaintiff, who has since refused to give it to him. That from the 13th of November, 1858, when the articles of partnership were signed, to the middle of December following, the business was carried on between them as copartners. That

on the 23rd of December, certain disputes having arisen, it was agreed to refer the partnership affairs to Alex. McKenzie, and Gardner Elwood, and if they could not agree they should choose an umpire. That the award made by McMillan is right and proper, and within the authority so agreed to be given to him as far as it adjudicates on the partnership concerns, accounts and books. That McMillan exceeded the authority given to him by the submission in awarding that the note and the mortgage should both be paid, as the same were not partnership transactions, and were not therefore included in the submission.

The defendant also stated that subsequently to the award, and prior to the commencement of the suit, the plaintiff got possession of his books, kept before the partnership commenced, and had collected a large amount of accounts due to him and entered in said books. That he was informed that within the last year plaintiff admitted to Gardner Elwood that he, defendant, was only indebted to him, plaintiff, in the amount of the arbitrator's fees on such award. He stated that he gave proper instructions for his defence to his attorney that he wished to alter the pleadings to let in his defence, that he was informed and believed he had a good defence on the merits. Gardner Elwood's affidavit was also filed on behalf of the defendant. He stated that the submission to arbitration was merely as to partnership concerns; that at the arbitration he objected to the note sued on being taken into consideration, as the note was not a partnership transaction; that he was informed and believed at the time of the arbitration, and continued to believe, that the note was included in the mortgage made by defendant to plaintiff; that subsequently to the arbitration, and within the six months preceding the making of the affidavit, the plaintiff admitted to him that the defendant was indebted to him, the plaintiff, only in the amount of the arbitration fees on the award.

The plaintiff, in his affidavit, expressly contradicted all the material statements in the defendant's affidavits.

He stated that *all transactions between him and the defendant, whether partnership or otherwise*, were referred to arbitration; that at the arbitration the defendant set up the same

defence to the promissory note in the pleadings mentioned, which he seeks to set up now, and that the umpire McMillan, having heard evidence on both sides, decided as in the award set forth, that the note was not included in the mortgage and ordered both note and mortgage to be paid to him; that at the arbitration the defendant did not, nor did any person on his behalf, object to the umpire awarding respecting the note and mortgage, but on the contrary it was distinctly understood and agreed that the umpire should determine all transactions between the defendant and him, concerning which there was dispute, and amongst other things respecting the note and mortgage. He further stated that the note was not, nor was any portion of it, included in the mortgage, but the mortgage was given to secure to him the repayment of the \$1300 then lent by him to the defendant. That the difference between the amounts due by defendant to Blue & Moore, and the \$1300, was paid by him, plaintiff, to defendant, in cash, in the office of W. L. Lawrason, Esq.

He then stated that he only got possession of the partnership books, and in one only of them defendant's private accounts had been entered, but that book was used by the partnership at defendant's suggestion; that he never collected any of his, defendant's private accounts, and has only been able to collect about \$10 of the partnership accounts. He further stated, that he never admitted to Elwood or any other person, nor is the fact so, that defendant was only indebted to him in the amount of the arbitrator's fees, and that Elwood is in error in making such statement. He concluded by stating that the verdict is just.

Bayley, the plaintiff's attorney, stated that Elwood was present in court when the cause was tried.

RICHARDS, C. J.—I think this rule must be discharged. Neither plaintiff or defendant files the original submission to arbitration between them. The defendant, by his affidavit, contends the reference was only of partnership matters, the plaintiff states expressly in his that it was of all transactions between them, whether partnership or otherwise.

The award itself, made within a fortnight of the date of the

submission, recites that instrument, and as it is set out it certainly appears to be full and ample to cover all controversies between them of every description. The award refers to this note and the mortgage, and declares that they are to be paid according to their terms. There does not appear to have been any application made to set aside the award because the umpire had in this exceeded his jurisdiction, and there can be no doubt that this matter was brought before the arbitrators as something in dispute between the parties. The affidavit made by the defendant's arbitrator Elwood shews that he objected at the arbitration to the note being taken into consideration, as it was not a partnership transaction. The plaintiff's affidavit being express both as to the submission and the fact that the subject of the note and mortgage were taken into consideration by the umpire, and the award itself in reciting the submission (being made at a time when there is no reason to suppose that there was any object in mis-reciting it) fully sustaining the statements of the plaintiff on both points; I think we are safe in coming to the conclusion that the submission was broad enough to permit the dispute about the note and mortgage being taken into consideration by the arbitrators and umpire, and also that it was taken into consideration by the umpire, and that he awarded in favor of the plaintiff.

In this view the plaintiff would seem under the award to be entitled to recover the note and other sums for which his verdict was obtained.

We are asked to set aside the verdict to permit the defendant to set up as a defence that the mortgage was received in satisfaction of the note. But this matter was brought before the arbitrator and he has decided on it against the defendant, and his decision must be regarded as final.

As to other grounds of defence on matters arising since the award, by payment, or from receipt of money by the plaintiff to defendants use, they were open to the defendant on the pleadings at the trial, and no reason is urged why they were not then set up.

The bare statement by Mr. Elwood that plaintiff admitted that the defendant only owed him the amount of the arbitrator's fees on the award, in the absence of anything to shew how

the defendant's liability, fixed and declared by the award, has been discharged, would hardly justify us in placing the case again before the jury, when it appears on the affidavits that Mr. Elwood was at the trial, and defendant did not then call him, and the plaintiff expressly denies having made any such admission.

As the case appears before us, the important defence intended to be set up by the defendant was the extinguishment of the note by the mortgage transaction, and that must fail, as it is disposed of by the award.

The rule for a new trial will therefore be discharged.

Per cur.—Rule discharged.

FAWCETT V. MOTHERSELL.

*Physician—Skill and diligence, want of—Corroborative evidence—Discovery of—
No ground for new trial.*

Action against defendant, a medical man, for neglecting to use due skill and diligence in the setting of plaintiff's thigh bone, which had been fractured. On the trial, the evidence of the professional witnesses generally went to shew that the plaintiff's case had not been properly treated, at the same time suggesting that the proper treatment in such a case would greatly depend upon the condition of the patient, and particularly upon the condition of the knee, which it came out on cross-examination of plaintiff's witnesses, had also been injured more or less. On motion for a new trial on affidavits of the discovery of further evidence shewing plaintiff's knee had been seriously injured, *Held* that a new trial will never be granted on the discovery of new corroborative evidence.

The writ was issued on 8th June, 1863.

The declaration stated that plaintiff, having broken his thigh bone, at defendant's request employed him in his profession of a surgeon to endeavour to cure him; that it was defendant's duty to use proper care and diligence, and to exercise proper skill to cure plaintiff. Breach—That defendant neglected to use proper care and diligence, and conducted himself so unskilfully that the plaintiff was injured in health and constitution, and through such neglect and unskilful treatment the union of the thigh bone did not occur. The plaintiff claimed damages £500. Defendant pleaded not guilty, on which issue was joined.

The cause was taken down to trial before the Chief Justice of Upper Canada, at the last Fall Assizes for the county of Lambton.

From the evidence at the trial, it appeared that plaintiff, on the 7th June, 1861, met with an accident by falling some eighteen feet from a building, which fractured his thigh bone. Defendant, who was a practising physician, residing about ten miles from plaintiff's house, was employed to attend him. For the purpose of extending the limb he used the double inclined plane, but no bandages; the defendant stating he never used bandages. The splint, when first used was not fastened, and when the patient moved in his bed, moved also. Afterwards there were pieces put at the sides. It is probable that the leg did heal at first, but was afterwards broken. Defendant still continued to attend, and subsequently tried the straight splint. One of the witnesses said that this was very painful, and defendant removed it and again used the inclined plane splint, but one a little different in length, &c. The plaintiff still continued under defendant's treatment. Plaintiff's mother went to his place on the 3rd October, and saw defendant on the 6th and told him plaintiff thought his leg was loose. Defendant examined it; said he saw no appearance of a false joint or any danger of it. The limb was then in *a crooked box* (probably the inclined plane), and defendant said he never did put splints and bandages. She was there three weeks attending plaintiff, and during that time defendant's directions were followed. Defendant from time to time assured plaintiff's friends he was doing well until November, when he told one of the witnesses it was a bad job, and he thought plaintiff would have to lie there some time yet. About the middle of December he was removed to Scarborough and placed under the care of the Doctors Closson.

There was evidence brought out by the examination of several of the witnesses, the neighbours of the plaintiff, that his knee was sore from the first; that it was injured, and he complained of it; and that was suggested as a reason why the leg had not been properly extended. The defendant had been in attendance on plaintiff about six months when the latter was removed to Scarborough.

Dr. Closson first saw the plaintiff on the 17th of December, with his leg in the double inclined plane, with two side boards and without any bandages. The leg, foot and all, more or less

swollen. The leg was carefully removed and proper splints prepared, which could be lengthened by a screw (gutta percha, which might be softened by water so that they would fit the limb as they dried). They first extended the limb as far as they could, then bandaged the whole limb, then put on sheets of cotton batting and then bandaged on the splints. The plaintiff was up in two or three months. The attending physicians were satisfied that in two weeks union had begun. They were satisfied that in similar cases to plaintiff's, the patient ought with proper and prompt treatment to be up from bed in six weeks or two months.

The defendant called one witness, who proved that plaintiff had said, the second time he was moved out of bed, his leg gave way. This witness saw plaintiff frequently. The rest of the evidence was professional; and the first medical witness defendant called stated that the extension of the limb ought not to have been delayed, and, if the knee was injured, the leg ought to have been extended at all hazards before the lapse of 20 days. In his opinion it should not be delayed 30 days. He added, if the pain continued in the knee joint he would not extend. He did not agree in the latter part of the defendant's treatment, even if the knee was injured. He thought the latter part of the defendant's treatment decidedly wrong. There was nothing to shew why defendant did not do what Dr. Closson did. He thought it highly imprudent to take plaintiff so long a journey.

Another of the professional gentlemen said he would have begun by trying extension, and persisted or not as he found the patient's condition in regard to the knee. After further statements, shewing the difficulty from complications as to injury to the knee, he said from all he had heard he could not differ from defendant's treatment; he thoroughly endorsed it. He agreed with the other witnesses there ought to have been extension before the removal to Scarborough, which he thought the worst thing that could have been done.

Four other medical men were called, and they were not prepared to express any opinion for want of satisfactory evidence as to the injury to the knee joint.

The learned *Chief Justice* left the case to the jury on the

evidence, on a charge which is not objected to, and they found a verdict for the plaintiff, damages \$400.

In Michaelmas term last, *Roaf*, for defendant, obtained a rule *nisi* for a new trial, on the ground that since the trial defendant had discovered new and material evidence of the plaintiff's knee having been injured, and that the defendant was taken by surprise by the evidence given by the plaintiff's witnesses, to the effect that the plaintiff's knee was not injured ; and on affidavits filed.

On moving the rule, he filed the affidavits of three persons relative to the injury in plaintiff's knee, besides the affidavit of Rebecca Phillips, who was sworn on the trial. The statement of the deponent most favourable to the defendant was to the effect that he was in plaintiff's employ when he had his thigh broken, and whenever he entered the house plaintiff would complain of the pain he was suffering in his knee, and he several times said he doubted whether it would ever get better, and he was afraid the knee would cause him more trouble than the fractured thigh bone. Another deponent stated, that he first saw the plaintiff a few days after the accident, when he complained of great pain in his knee. About a week after he saw his knee and it was swollen to a large size, and he complained of his knee being painful until he left for Scarboro'. And the other stated that when he went to see plaintiff shortly after the accident, he stated he suffered no pain except in his knee which was very painful.

Rebecca Phillips, who was sworn on the trial, and although the subject of the injury to the knee was spoken of, did not then say anything about it, in her affidavit says she was in the habit of seeing plaintiff every day from the time of the accident until he went to Scarboro'. She was at plaintiff's house a day or two after he was assisted out of bed in the wheat harvest. That plaintiff said he had sat up all day and the leg felt comfortable so far as the break was concerned, but complained of the knee from the beginning and all through until he left.

All the witnesses called by the plaintiff, who saw him at his house, were cross-examined by the defendant's counsel at the trial as to the knee being swollen and injured, and they all

but one speak of its being more or less swollen. The second witness called for plaintiff, who was present and assisted the defendant when he first set the leg, stated that the knee was considerably swollen, and that the plaintiff complained a good deal of the knee at first. The third witness said I think the plaintiff's knee was rather injured, it looked so. The fourth—there was some injury to plaintiff's knee; it was a little swollen. The fifth, who first saw him on the 20th of June,—the knee was swollen a little when I saw him first, and also when he was brought to Scarboro'. The sixth, who saw him first on the 30th,—plaintiff's knee was the same when he came to Scarboro' as when he was at home in October, the whole leg, knee and all, was swollen. The doctor at Scarboro' said it was a simple fracture of the thigh, and when plaintiff first came there the leg, foot and all were more or less swollen.

The rule for a new trial was enlarged until last Hilary Term when *McMillan* shewed cause and filed affidavits contradicting those filed by defendant, both as to the knee being a matter complained of by the plaintiff at first, and on other points. He contended that the case had been fairly submitted to the jury, who, on evidence fully warranting it, had decided against the defendant. He also referred to the evidence of one or two of the physicians called by defendant, as shewing that his treatment had been disapproved of by them.

Roaf, in reply, contended that the case turned on the question of the injury to the plaintiff's knee. That defendant was not in a position to know who could prove that plaintiff complained of his knee from the first. That he lived some miles distant from plaintiff's place, and was not able to discover the evidence which did exist, and was much at the mercy of plaintiff's witnesses. That as he now had discovered further evidence, and the verdict affected his professional reputation, there ought to be a new trial, particularly as the damages were large.

RICHARDS, C. J.—There is no doubt that the position of a medical practitioner, called on to attend a patient who resides ten or twelve miles from the residence of the physician, is often

a very embarrassing one. If the unfortunate patient is in poor circumstances and unable to procure the needful assistance, the physician may be as attentive as he possibly can, and give all needful instructions, but he has a conviction in many cases amounting to absolute certainty, that his instructions will not be carried out. If under such circumstances, in serious cases, the patient fails to recover as speedily as he would under more favorable treatment, the physician is often blamed for want of care and want of skill. If the illness is one arising from injuries to the leg, such as a fractured bone, it makes the individual incapable of helping himself, and often causes great pain and uneasiness. Under such circumstances the patient himself, with a view to mitigate his uneasiness and sufferings, may loosen the bandages and disturb the limb often in the process of healing, and in that way may retard his own recovery. The medical man in attendance is seldom informed of this imprudent conduct on the part of the patient, indeed it is generally studiously kept from him, and he is often blamed for want of care and attention when the patient himself, or his friends, by their own recklessness, have caused the mischief. And when, superadded to this, it is considered that the medical man, in the event of a shortening of the limb and of a protracted recovery, is liable to be harrassed by an action for want of skill or want of care, his position is by no means an enviable one. Considering these things, judges are generally desirous of impressing on juries the necessity of construing everything in the most favorable way for the defendant when such actions are brought against a surgeon.

In the case before us, I have no doubt the learned *Chief Justice* left the matter to the jury in as favorable a light as he could for the defendant. His charge is not complained of and the jury have found for the plaintiff. It is not suggested that we can interfere on the ground of excessive damages.

I have recently, in the case of the *Queen v. Chubbs*, referred to some of the late authorities in England on the subject of granting new trials when the case went fairly to the jury, and the court cannot say that their verdict is wrong. But in this case the evidence given by the first medical gentleman called by the defendant was most damaging to his case. His remarks,

which appear in the statement of the case, in reference to the treatment at first pursued, were calculated to impress the jury unfavorably, but when followed by language such as this—"I do not agree in the latter part of defendant's treatment even if the knee was injured. There is nothing to shew why defendant did not do what Dr. Closson did,"—the defendant could hardly hope to have a verdict. Then the next medical gentleman called, after stating many things favorable to defendant, used this language—"I agree with Dr. Billington there should have been extension before the removal." The other medical testimony was merely of a negative character, and not calculated to meet the unfavorable view of the defendant's treatment presented by the witnesses called by the plaintiff, as well as of the medical gentleman first called by the defendant himself.

The defendant's rule asks for a new trial on the discovery of fresh evidence; but this evidence is merely further evidence to confirm the case set up by the defendant at the trial, and as to which several witnesses were examined. The evidence brought out at the trial, it is true, was given by the witnesses called by the plaintiff, but it was elicited by the defendant's counsel, and the newly discovered evidence is only adding to the evidence given on that very point, and it is not probable if it had been given at the trial it would have had much effect on the jury. A new trial is never granted on the discovery of new corroborative evidence.

In the case of *Scott v. Scott*, before *Wilde, J.O.*, (reported in 9 L. T. N. S. 456), from which I quoted a passage in the case of the *Queen v. Chubbs*, this very point is well put. "It has never been the habit in Westminster Hall to grant new trials on the simple ground that the party could make the same case stronger, by corroborating testimony (even though newly discovered), if another trial were allowed. And if it were otherwise, there are few cases that would not be tried a second time."

On the whole I see no ground on which we can properly interfere for the relief of the defendant.

The rule for a new trial must therefore be discharged.

Per cur.—Rule discharged.

RAYNES AND WIFE V. CROWDER ET AL.

Ejectment—Conveyance by sheriff under sale for taxes—Misdirection—Avoiding deed for alleged fraud in making a false statement at such sale.

The defendants claimed title through one W. McC., who claimed by deed under a sale for taxes from the sheriff.

On the trial, it was proved that W. McC. claimed the lot in question, at the sale for taxes, and, alleging his title was imperfect, he asked the audience not to bid against him, which request they complied with, and he became the purchaser thereof for £4 or £5. The judge who tried the cause, left it to the jury to say, first, whether McC. made the statement mentioned; and secondly, if in consequence thereof, there was no competition for the lot; directing them that if they found in the affirmative, their verdict should be for plaintiff. The jury found for the plaintiffs, and that McC.'s statement was false, and that in consequence he purchased without competition.

On motion to set aside the verdict for misdirection,

Held, that the sheriff having duly conveyed the land by deed to McC., the legal estate thereby passed, and, if it was sought to impeach the deed for fraud, the case must be taken before a court of equity, whereby complete justice could be done to all parties concerned.

EJECTMENT to recover Lot No. 12, in the 8th concession of South Gower, in the county of Grenville, one of the united counties of Leeds and Grenville.

The case was taken down for trial before Mr. Justice *John Wilson*, at the last fall assizes of 1863, for the united counties of Leeds and Grenville.

The plaintiffs' claim to the lot was made out by reasonable evidence; the defendants claimed under a sheriff's sale of the land for arrears of taxes, through a conveyance from the sheriff of the united counties of Leeds and Grenville, to one William McCargar, dated the 2nd day of August, 1853. It was admitted the defendants had become possessed of the title that McCargar had acquired under the conveyance from the sheriff. The only point really in dispute at the trial was whether the conveyance from the sheriff to Wm. H. McCargar was void or not, in consequence of what took place at the sheriff's sale for taxes.

The adjourned sale was held April, 1851. The first witness, (Arthur Parr), who speaks of what occurred at the sale, said, "I knew Milo McCargar; he was at the sale; I remember his asking the audience not to oppose him in the purchase, as he had not a perfect title to the lot, but wished to have it perfected by a sheriff's sale; he was not opposed; and got the 200 acres for four or five pounds. He made the statement publicly, and no one opposed him. It is not unfre-

quent for people having imperfect titles to ask this. The statement was made publicly, and all about could hear; the witness understood the title was not perfect, and that McCargar wished to perfect it in this way; no one opposed him; the sheriff put up the lot in the usual way; after the sheriff put it up, McCargar spoke and no other person offered to take less of the lot.

Another witness, John Crawford, gave much the same account of what occurred at the sale. He stated that McCargar spoke to him before the sale, stating he owned the lot, but his title was defective, and he wanted to perfect it, and asked the witness not to bid against him. The witness told McCargar, if that was the case, he would not. He remembered the particular lot being put up; he added, McCargar stated publicly what he had before stated privately to him; the audience heard it and no one opposed him; McCargar intended all should hear him; he got the whole 200 acres; several lots were sold in the same way to persons making similar representations; there was spirited competition sometimes about the lots; he recollected some lots were bid off as low as 20 acres at that sale.

The Sheriff stated, he did not recollect the circumstance of McCargar speaking, but it was a common thing to make such requests as were mentioned.

It appeared that the land was entered in the sheriff's books as purchased by Joseph Bower, by Milo McCargar, his agent, and the sheriff's deed of the lot, dated 2nd August, 1853, was made to William H. McCargar, assignee of Joseph Bower; and defendants made title under this conveyance.

The learned judge left it to the jury to say, 1st, whether McCargar made the statement spoken of; and secondly, whether in consequence of the statement, there was no competition for the lot. If they found affirmatively on these questions, then they should find a verdict for the plaintiff. The jury found that McCargar made the statement falsely, and in consequence there was no competition at the sale. On this a verdict was entered for the plaintiff.

In Michaelmas term last, *McBride* obtained a rule *nisi* to

set aside the verdict and grant a new trial, the verdict being contrary to law and evidence, and for misdirection, in this, that the questions submitted to the jury, and on which the verdict was based, were wrongly and improperly submitted. This rule was enlarged until Hilary Term last, when

A. Crooks, Q. C., shewed cause and contended that the jury having found that McCargar's statement was false, and that it prevented competition at the sale, it was fraudulent, and that the conveyance to Wm. H. McCargar, having been obtained through this fraud, was void, and defendants claiming through this conveyance could not make any title. He referred to *Todd v. Werry et al.*, 15 U. C. Q. B. 614; *Smith v. Kay*, 7 H. of L. Cases, 757; *Hall v. Hill*, 22 U. C. Q. B. 582; *Henry v. Burness*, 8 Grant, Chancery U. C. 353; *Vorley v. Cooke*, 1 Giffard, 230; *Kent's Commentaries*, vol. 4, 464, note C; *Lawton v. Elmore*, 27 L. J. Ex. 141 (Jan. 1858); s. c. 30 L. T. 244; *Attorney General v. Magdaline College*, 18 Bevan, 223; *Lessee of Miner v. McLean*, 4 McLean, 138; *Sands v. Codwise*, 4 Johnson, 536.

McBride, contra, contended that the evidence did not shew that McCargar's statement prevented others from bidding; that there was nothing to shew that the statement influenced the sheriff; and that there was no fraud on him, and he gave the deed, and consequently the estate passed; that what occurred might perhaps have justified the parties in going into chancery to cancel the sale, but it could not be set up to make the deed void. He contended, the sale in other respects being legal, the learned judge ought to have directed a verdict for the defendants. He referred to *Provincial Statutes*, 6 Geo. IV. cap. 7, secs. 8, 11, 16, 22; 7 Wm. IV. cap. 19; and 3 Vic. cap. 46; *Dobbie v. Tully*, 10 U. C. C. P. Reports, 432; *Bryant et al. v. Hill*, 23 U. C. Q. B. 96.

RICHARDS, C. J.—The sheriff being the officer by law appointed to carry out the sales of land for arrears of taxes, is the person who regulates the mode of conducting these sales, and if he was satisfied there had been any improper proceedings at the time of the sale, he might have refused to

confirm it, and could have put the land up again for sale. He, however, having, recognised the sale and made a conveyance of the land, it seems to me that the legal title to the land passed to the person to whom the sheriff made the deed. If I am correct in this view, the plaintiff's action fails.

Fuller v. Abrahams, 3 B. & B. 116, S. C., reported at greater length in 6 Moore, 316, is an authority which would have justified the sheriff in refusing to convey the land to the purchaser or in refusing to recognize the purchase if he had deemed his conduct fraudulent. There a barge had been put up for sale by auction. The plaintiff addressed the company present, saying he had a claim against the late owner by whom he said he had been ill used, whereupon no one offered to bid against him; the auctioneer refused to knock down the barge to the plaintiff's single bidding; a friend of the plaintiffs bid a guinea more, and the plaintiff then made a second and higher bidding amounting however only to one-quarter of the prime cost of the barge; the auctioneer being indemnified by the vendor, who had taken the barge in execution, refused to deliver it to the plaintiff, and he having sued for the barge, *Dallas, C. J.*, held there was no legal sale under the circumstances. The jury found for the plaintiff, and the court set aside the verdict. I apprehend however if the bid had been accepted and the barge knocked down to the person bidding, and paid for, and the barge had been delivered to him, the property would have passed.

In *Feret v. Hill*, 15 C. B. 207, very many of the cases, in relation to avoiding contracts on the ground of fraud, were referred to and considered. There the plaintiff had induced the defendant to give him a lease of certain premises on the representation that he intended to carry on the business of a perfumer thereon. He was let into possession and converted the premises into a common brothel, on which defendant gave plaintiff notice to quit forthwith, and on his refusal to do so forcibly expelled him. On this ejectment was brought to recover possession. The defendant contended that the facts shewed plaintiff had used the premises for an illegal and immoral purpose, and the agreement was altogether void; and further, that defendant had been induced by the plaintiff's false represen-

tation to enter into the contract, and therefore was justified in rescinding it. Two questions were left to the jury—*first*, whether the plaintiff, at the time he hired the apartments, intended to use them, or to permit them to be used, for an immoral or an illegal purpose; *secondly*, whether he had induced the defendant to let them to him by fraud and misrepresentation. The jury found both questions in the affirmative.

The court, however, notwithstanding the finding of the jury, held that the term had vested in the plaintiff, and he having been once let into possession, what had taken place did not divest the plaintiff of the interest which had passed to him, and his title to maintain ejectment could not be impeached in a court of law. The defendants proper remedy if any was in a court of equity.

I have not met with any case where it has been held that representations such as have been complained of here, even if false and fraudulent, would make the deed void. The cases in our own court of chancery shew, that on combinations for the purpose of purchasing land at these sales for taxes without competition the sales will be set aside; but even in most of those cases they have directed the purchase money and interest to be refunded to the purchaser. I am not aware that it has been held in any case that the conveyance is *void*.

It is urged that the statement of McCargar being false, as to his having an imperfect title to the lot, ought to avoid the sale, because it induced others not to bid against him. Suppose the statement to have been true, and parties not bidding against him in consequence, was it any the less a fraud on the true owner and the one who had the perfect title, and would not the latter thereby be deprived of the advantage of having the competition as to the purchase which he would otherwise have obtained.

Suppose McCargar had said, "This lot adjoins one of mine and it will be much more convenient for me than any one else, I have very little wood on my lot and this is a good wood lot, and I want very much to get it, and I hope those present will not bid against me but allow me to purchase it." Suppose this all to be true, could not the sale be impeached under this state of facts on principle just as well as in the case actually

proven at the trial. Would not the injury to the true owner be just as great in the one case as the other. I think it would.

If the parties have any relief it is much better it should be in a court of equity, where more complete justice can be done than in this court. This sale took place about thirteen years ago, the property now is in the hands of parties who it is not pretended knew anything of the irregularity or fraud complained of at the sheriff's sale. Valuable improvements have been made on the land, and much of its present value undoubtedly arises from the labor of those who in no way participated in or had knowledge of what is now complained of. It certainly would be unjust to deprive these men of the fruits of their industry if it can be avoided. If the plaintiffs have any rights in this property it is most probable they have been preserved to them by the fact, that the land was purchased at the sale referred to and has been improved since. If it had been a wild lot it might have been sold again and again for arrears of taxes. If owners of real estate will take no trouble to look after it, and the taxes are paid by those who have purchased in good faith under a title, which on the face of it seems correct, it is not unjust that all the circumstances connected with transactions of this kind should be brought before a court of equity, when it is intended to set aside these conveyances made by the proper officer. That court can do complete justice in such cases, we cannot. All that we can enquire into is the question, has the estate passed by the conveyance, if so, as long as the conveyance remains we must give force to it. The rule to set aside the verdict and grant a new trial will be made absolute without costs.

See *Mallalieu v. Hodgson*, 16 Q. B., at p. 712; observations of *Erle, J.*, as to avoiding a deed for fraud; *Howard v. Castle*, 6 T. R. 642; *Crowder v. Austin*, 3 Bing. 368; *Feret v. Hill*, 15 C. B. 225; *Wright v. Campbell*, 2 F. & F. 393, to same effect.

Per cur.—Rule absolute.

HOOPER V. CHRISTOE.

Promissory note—Endorser—Payment by—New trial.

Declaration on a promissory note made by defendant payable to J. L. T.

3rd Plea. That on maturity of the note J. L. T. paid the amount thereof to plaintiff, and thereby became the holder thereof, and while he was such holder defendant paid J. L. T. all moneys due in respect thereof.

At the trial evidence was given by defendant which shewed that J. L. T. had paid the amount of the note to plaintiff, and that defendant had paid J. L. T. J. L. T. was called by plaintiff to rebut this evidence, and he contradicted it. Letters were also put in which went to corroborate facts set up by defendant. The whole case was left to the jury and they found for defendant. On motion for new trial, the verdict being against evidence, and for surprise by the evidence put in by defendant, the same being false, and on affidavits contradicting it,

Held, that as by the affidavits filed on this application it appeared the plaintiff asked for a new trial to adduce corroborative evidence of that given by J. L. T., whereas he might have taken a nonsuit had he been so advised, he is not entitled to a new trial. The rule being that "having speculated on the chances of success before the jury, he is not in a position, in case of failure, to ask the court to give him an opportunity of presenting his case to another jury."

The rule in relation to new trials is that the verdict ought not to be disturbed unless it is clearly wrong.

DECLARATION on a promissory note dated the 10th March, 1858, payable to the order of one J. L. Tucker for six hundred and twenty-nine pounds eighteen shillings and three pence, one year after date, with interest, averring endorsement by Tucker to the plaintiff and non-payment by defendant. Plaintiff claimed £1000. Defendant pleaded,

1st. He did not make the note.

2nd. Payment.

3rd. That the note was given at the request of one Joseph L. Tucker, to whom defendant was then indebted, that after the note became due Tucker paid to the plaintiff, he being the holder thereof, the amount of the said note, together with all interest due thereon, and Tucker took up and became, and was the holder of the said note, and whilst he so held the note and after the same became due, the defendant paid the amount of the note, together with all interest due thereon to Tucker, in full satisfaction and discharge thereof; and defendant also said that after the note was so due and paid, Tucker re-assigned and transferred the same to plaintiff. Issue was joined on these pleas.

The cause was taken down for trial at the last fall assizes for the county of the city of Toronto, before *Adam Wilson, J.*

The note set up in the declaration was either proved or admitted, and defendant then called William L. Broad to prove his second and third pleas. His evidence went to the full extent of shewing that the note had been paid by Tucker to the plaintiff, and by the defendant to Tucker. The plaintiff called Tucker, who gave his account of the transaction, contradicting Broad in many important particulars. A letter from Christoe to Tucker, and the reply to it, were put in, which seemed strongly to corroborate some of the facts set up by the defendant and spoken to by Broad. The learned judge left the whole case to the jury, his charge was not objected to, and the jury found for the defendant.

In Michaelmas Term last, *Hector Cameron*, for the plaintiff, obtained a rule *nisi* to set aside the verdict as being against evidence and the weight of evidence, and on the ground that the plaintiff was taken by surprise by the evidence given by the witness Broad at the trial and that the said evidence was false. He filed several affidavits on the motion, and also on the argument. The rule was enlarged until Hilary Term last, when *C. S. Patterson* shewed cause, and contended that the case went fairly to the jury on the conflicting statements of Tucker and Broad, and that the jury, as well they might, believed the account given of the matter by Broad rather than Tucker, as the statements of the former were more consistent with the other established facts of the case and were more reasonable. That Tucker, at the trial, appeared to be the principal party concerned on behalf of the plaintiff, and no doubt felt more interest in the result of the suit than the plaintiff himself, who was not at the trial. He contended that the affidavits filed on behalf of the plaintiff failed to give a satisfactory account of the transactions between the parties. He filed affidavits which he stated shewed the verdict was right and ought to stand.

H. Cameron, contra, argued that the evidence of Broad was contradicted by the affidavits of Hooper and Connell, and that his statement was not to be relied upon; that the plaintiff was taken entirely by surprise by Broad's evidence, and that he ought to be afforded an opportunity of explaining

the matter before another jury, when all the evidence on both sides could be brought out.

RICHARDS, C. J.—The principal facts of importance to be considered in this case, so far as our judgment is concerned, are not numerous. On the 10th March, 1858, defendant, at the request of Tucker, made the note sued on. This note, it was intended should be given to plaintiff on account or satisfaction of a debt due to him by Tucker, at the same time defendant signed another note at Tucker's request, to be given to one Billings. After these notes were given, the balance of their accounts was in defendant's favor as between him and Tucker. Christoe contends that Tucker was to take up both these notes, and he defendant was to charge Tucker whatever he advanced or paid him, in money or goods, after that. This, however, was denied by Tucker. The note sued on was delivered to plaintiff, and he retained it until, as Tucker says, March, 1862, when he gave it to him, and he kept it until December following, when he re-delivered it to Hooper. He said he got it for the purpose of obtaining other notes from Christoe in payment, and that he did not hold it as his own; he never got a settlement with Christoe, and returned the note to Hooper.

In 1860, one Connell, Hooper's father-in-law, owed Tucker, and was in embarrassed circumstances; with a view of paying his debts, he agreed to sell part of his farm to Hooper, for £500. Tucker drew the conveyance for him; the date, he says, was in September, 1860. This deed was executed, and the understanding was, that Hooper was to pay Connell's debts, and pay him the balance. The deed was left with Tucker for Hooper, but it is said Hooper refused to accept it, because it was for 50 acres instead of 60; the deed still lies in Tucker's hands. Connell was indebted to Tucker in about £300. Tucker afterwards, in November, 1861, settled with Hooper, and gave him his note for £150, a village lot and house valued at £150, and allowed a running account which he had against him, amounting to £170, making in all £470, which he said he owed Hooper for wages in 1861. Hooper built a barn on the land which was described in the deed made by Connell, and is still in possession of the land by himself or

his tenant. Connell and Hooper, as well as Tucker, deny that the proceeds of the sale of the farm went to pay Hooper the note sued on, or any part of it. On the other hand, Broad's statement is clear as to the admission, both by Tucker and Hooper, of the note being paid by Tucker to Hooper. Broad also states the whole £500 was to be applied on the note.

Now suppose we were to grant a new trial how would the matter stand. Broad and Tucker would again contradict each other as to the important facts of the case. Christoe and Hooper, by their affidavits, directly contradict each other; and the only other person whom it is suggested can be called as a witness for the plaintiff is Connell, and the point on which he would speak would be as to the application of the £500, the price of the land; whether the same or any part of it went to pay this note. As to the other questions arising in the case he knows very little.

For the defendant, we have the express evidence of W. Broad, a witness at the trial, who stated that Hooper admitted to him that he had had a settlement with Tucker and had given him Christoe's note and had thrown off the interest against Tucker. One of the affidavits filed by defendant shews that plaintiff admitted to the person making the affidavit that he had got Connell's fifty acres on account of the note.

There was a note of Hooper's for \$1,442 payable to one Parker, which matured at the Ontario Bank on the 9th Dec., 1862. On the first of that month defendant wrote a letter to Tucker in the latter part of which the following occurs:—"I shall not feel free however to cover Parker's affair without Hooper's note is given up or destroyed." Under date of 3rd December, 1862, in relation to that, Tucker replied: "I cannot understand your remarks about paying me the amount you got from me, and about Parker's note. I do not know whereabouts the note of Hooper's (that you speak of) may be, whether it is already destroyed or not is more than I can say, though I fancy not, and think that it is somewhere amongst my papers; will look for it." After this Christoe paid the \$1400 note of Parker's for Tucker, and charged it to him in account. -

The rule in relation to new trials is, that we ought not to disturb the verdict of the jury, unless we can clearly see that it is wrong. The only plausible ground on which we are asked to declare it wrong is in relation to this transaction about the conveyance of Connell's land to Hooper.

How does the plaintiff himself clear this up. According to Tucker's statement in 1861 he settled with plaintiff, and the amount he paid him, with contra account, notes and town lot, was £170 for wages to 1861. The wages, it is stated, were up to that time only for two years, the mill having been burned and re-built. The wages were said to be \$500 for one year and \$400 for another. If three hundred pounds of the proceeds of the sale were applied towards paying the amount due by Connell to Tucker, that would make his claim, with the amounts as above, £770, and the note without interest and the wages as above would make about £850 in round numbers, leaving a difference of about £80 between the two sums.

If Christoe's account against Hooper, amounting to £58, mentioned by Broad as charged to Tucker, and his account against Connell, amounting to £16, is not included in the account of the latter against Hooper of £170, it would nearly cover the balance.

In the evidence presented by the plaintiff this state of things exists. From 1860 or 1861 to the present time Connell has been owing Tucker £300 (when he was examined at the trial he said he had a mortgage on his place for that amount which was paid, that view does not seem to be presented by the affidavits now filed for plaintiffs). This sum Tucker in the present aspect of the case has not received from any one; then Connell's deed to Hooper has been allowed to remain in Tucker's hands ever since September, 1860, and has never been re-delivered to him or accepted by Hooper, and Hooper has built a barn on the land conveyed by this deed, and rented the land, yet he does not own it, and the matter of its purchase is not yet closed, and this state of things has existed some three years, and all parties seem content with it.

This certainly does not seem to be a very reasonable account of that transaction; but when, in addition to the other confirmatory evidence given at the trial, and referred to in the

affidavits, we find Tucker in the letter of the 3rd December, from which I have quoted, using language entirely inconsistent with the idea now put forth, that this note was then the property of Hooper, there can scarcely be a reasonable hope that an intelligent jury would give a verdict for the plaintiff on his testimony.

The affidavits go over the accounts between Christoe and Tucker, but on that point, as far as the case is concerned, the finding of the jury would not be disturbed. The only point on which there can be any argument, is as to the application of the amount for which Connell's lot was sold. The plaintiff's account of that transaction fails to make it clear that a large portion of the purchase money of that lot was not due to Tucker; and if so, how has that been paid or applied? The possession of the note now sued on by Tucker, after that alleged sale, and the way in which Tucker refers to the note in his letter already quoted, are strong facts to go to a jury, to contradict his view of the transaction.

Assuming that Hooper may have been surprised at the evidence of Broad, yet the very case now set up, or something like it, was presented to the jury on the evidence of Tucker, and what plaintiff seeks now is to get a new trial to adduce corroborative evidence to that given by Tucker. He could have taken a nonsuit, if he had thought proper, but he preferred going to the jury, and to take his chance of getting a verdict; having failed in that, he now asks for a new trial. The rule is, having speculated on the chance of success in that way, he is not in a position, in case of failure—to ask the court to give him an opportunity of presenting his case again before the jury. The learned judge who tried the cause is satisfied with the verdict, which is another reason why we ought not to interfere.

On the whole, I think this rule must be discharged.

Per cur.—Rule discharged.

HUNTER V. JOHNSON, (EXECUTOR.)

Executor—Dower—Costs of defending suit for.

In an action brought against the executors of a grantor in a full covenant deed, to recover damages sustained by the plaintiff, by reason of the payment of a sum of money on an action for dower, the defendant pleaded the deed was not the deed of Thomas Johnson in his life time, and *plene administravit*. To the first plea the plaintiff joined issue, and to the second replied lands.

It appeared on the trial that an action had been brought against one G. S. B. for the recovery of this dower, and a release obtained for \$120; but not until after a defence and some £20 of costs were incurred, and that the only amount paid by plaintiff was \$50. Upon this the defendant's counsel contended that the \$50 was all plaintiff could recover. The learned judge directed a verdict for the £30, and left it as a question for the jury to decide whether the costs of defending the dower suit should be allowed. The jury found for the plaintiff, giving \$240 damages. Upon motion for a new trial

Held, that the jury should have been directed that the defence of the dower suit was not justifiable, the deed containing the release of dower executed in May, 1835, not being signed by the wife, although certified to by two magistrates, and the costs thereof should have been disallowed; and that the plaintiff was only entitled to recover the amount paid for the release of dower and interest. The verdict was therefore ordered to be reduced to that amount, otherwise a new trial to be had.

Writ was issued on the 16th of June, 1863.

Declaration alleged that defendant's testator, on the 13th of May, 1835, by deed between him and John Allan, in consideration of £63, conveyed unto Allan in fee simple, the north half of lot No. 19, in the 6th concession of the township of Cavan, and thereby covenanted that Allan, his heirs and assigns, at all times thereafter, might quietly enjoy without molestation or interruption of Johnson or his heirs, or any other person who might claim the same by, from or through him or them, and that freely and clearly and absolutely acquitted and discharged, or otherwise well and sufficiently saved harmless, and kept, indemnified by Johnson and his heirs, &c., of, from and against all and all manner of other and former gifts, grants, jointures, dowers, uses, entails, acts, titles, charges and encumbrances whatsoever, had, made, done, committed or suffered by him, the said Johnson, or any other person or persons, or by, through or with his or their, or any of their acts, means, procurements, consent or privity; and Allan afterwards by deed bearing date the 12th of October 1835, conveyed the said land and premises to one Charles Clark, in fee simple; and Clark afterwards, by deed dated the 23rd of March, 1836, conveyed the said parcel of land and premises to Benjamin Clark in fee simple; and the said Ben-

jamin Clark afterwards, on the 9th of September, 1837, conveyed the land and premises to George S. Boulton, who, on the 7th of February, 1844, conveyed to the plaintiff in fee, who thereby became entitled to the benefit of the covenants and to sue thereon, and plaintiff averred at the time of the sealing of the first deed, while the said Johnson was seised of the land, he was lawfully married to one Mary Maria Johnson, who was lawfully entitled to dower out of the land if she should survive him her husband. That the said Johnson died on the 1st of January, 1859, leaving the said Mary Maria Johnson, his widow, him surviving; that she on the 6th September, 1861, commenced her action for her dower in the land against the plaintiff in the Court of Queen's Bench, and such proceedings were thereupon had in the said action that she recovered judgment of seisin therein against the plaintiff, together with £24 19s. 2d. for her costs of suit; that she sued out and delivered to the sheriff on the 20th of June, 1862, a writ of *habere facias seisinam* and *feri facias*, directed to the sheriff of the united counties of Northumberland and Durham, to give the said Mary Maria Johnson seisin of the third part of the land, and that he should make the costs out of plaintiff's goods; that thereupon plaintiff was forced to and did pay the costs so recovered, and also the costs of his defence of the said action for dower, and was forced to and did pay the said Mary Maria Johnson, to wit, \$1000 in satisfaction of her dower so recovered, and plaintiff claims \$2000. Defendant pleaded

1st. The deed was not the deed of the said Thomas Johnson.

2nd. *Plene administravit.*

The plaintiff joined issue as to the first plea; as to the second plea replied *lands*.

There was some rejoinder to this plea not entered on the record.

Then as to this rejoinder, the plaintiff seems to admit it, but seeks only judgment against the lands of the testator which were, at the time of his death, belonging to him; but because it was unknown if the defendant would be convicted upon the above question put in issue to be tried by the country, the giving of judgment was stayed until the trial and determination of the said issue.

The cause was taken down to trial at the fall assizes of 1863, held at Cobourg, before Mr. Justice Morrison. The conveyance from testator to John Allan, dated the 30th of May, 1835, put in and admitted, as also deed from George S. Boulton to plaintiff, dated the 7th of February, 1844, of the same lands,—the mesne conveyances were probably admitted. The deed from Boulton to the plaintiff seems to contain quite as full a covenant for quiet enjoyment as that from testator to Allan.

A release of her dower in the lot from Mrs. Johnson to plaintiff was also put in, consideration £30.

Mr. G. S. Boulton was called as a witness and proved that the release was obtained by him. He paid the doweress \$120, Mr. Weller \$20, and Mr. Cockburn, costs, \$98; Mr. Weller \$110, plaintiff's costs. He dealt with Mrs. Johnson and her son about the release. The son knew the action for dower was prosecuted. He defended the action brought against Hunter the plaintiff, thinking the dower had been released by the deed on which the action was brought, (on the back of the deed there was a certificate of two justices of the peace that she had appeared before them and released her dower in the lands mentioned in the deed; she was no party to the deed). He thought he had good grounds for defending the action. The certificate on the deed was in his handwriting. He paid Mr. Weller and Mr. Cockburn. To his knowledge plaintiff had paid nothing. He advised plaintiff to defend as the real liability rested on him. He did not defend the suit for the executors, but Hugh Johnson was aware the suit was brought.

Mr. Stanton stated that he received from plaintiff £12 10s. on account of costs, part of the \$98, and Mr. Boulton was credited the \$50.

The defendant's counsel objected that the plaintiff was only entitled to recover the \$50 paid to Mr. Stanton, that the other amounts were paid by Mr. Boulton and not by the plaintiff. The learned judge ruled for the purpose of the trial that plaintiff was entitled to recover the whole amount paid, and reserved leave to defendant to move to reduce the verdict to £12 10s.

The defendant's counsel then addressed the jury, contending that the dower suit ought not to have been defended, and

that Mr. Boulton had ignorantly defended it, and he and his solicitor ought to have known the release set up was invalid, and went to the jury on the whole matter, whereon the plaintiff's counsel withdrew his consent to have leave reserved.

The learned judge told the jury if they were of opinion that the expense incurred by Mr. Boulton was useless and unnecessary, and that he was not justified in incurring it, they might reject the amount. The defendant's counsel objected that the learned judge should have told the jury that the invalidity of the lease was so palpable that the parties were not justified in incurring the expense of defending the dower suit. The jury found for the plaintiff with \$240 damages.

In Michaelmas Term last, *Hector Cameron* obtained a rule to set aside the verdict as against law and evidence, and that plaintiff was not entitled to recover the amount thereof in this suit under the evidence, and could not recover damages under the covenant sued on in respect of money not paid by him, and that the plaintiff proved no damages sustained by him and could not recover for any costs incurred in the action of dower mentioned in the declaration, the costs having been uselessly incurred and without the authority of the defendants, and for misdirection in the learned judge in ruling that the plaintiff could recover for money not paid by him but paid by Mr. Boulton, and in leaving it to the jury to say whether the costs were properly incurred, and in failing to tell the jury that as the release of dower was clearly invalid, that the costs were improperly incurred, and that the plaintiff was not entitled to recover the amount, and on the ground that the damages were excessive and unsustained by the evidence.

This rule was enlarged until Hilary Term last, when *J. R. Armour* shewed cause. He contended that plaintiff's right to bring the action was established on shewing the recovery in dower, and the writ *habere facias seisinam* issued thereon. The covenant thus broken, plaintiff's right of action was clearly maintainable; that the proper measure of damages was the expense of defending the dower suit, the costs of the demandant in that suit, and the amount paid the doweress for her release if that amount was reasonable; that it is not pre-

tended the amount paid to the doweress is unreasonable. As to the question that the dower suit should not have been defended; he answered that the testator having made a covenant that no one claiming under him should disturb the possession of any purchaser of the land, the owner of the land had a right to defend the suit; that at all events the reasonableness or unreasonableness of the defence was a matter of fact to be determined by the jury, and they had found for the plaintiff; that as to the money having been actually paid by Mr. Boulton, it must be understood as having been paid for plaintiff, and to relieve him and his land from the claim of the doweress and the costs of the suit. He contended the action could properly be brought for Mr. Boulton's indemnity. He also contended defendant's had notice of the action for dower having been brought. He referred to *Stuart v. Mathieson*, 23 U. C. Q. B. 135; *Hodgins v. Hodgins*, 13 U. C. C. P. 146; *Riddell v. Riddell*, 7 Simons, 529; *Cuthbert v. Street*, 9 U. C. C. P. 115; *Randall v. Raper*, 1 E. B. & E. 84; *Raymond v. Cooper*, 8 U. C. C. P. 388; *Stubbs v. Martindale*, 7 U. C. C. P. 52; *Rowe v. Street*, 8 U. C. C. P. 217; *Thornton v. Court*, 17 Jurist, 151; *Smith v. Compton et al.* 3 B. & Ad. 407; *Colten v. Wright*, 7 E. & B. 301; *Clarke v. Robertson*, 8 U. C. Q. B. 370.

Hector Cameron, contra, contended that there was no reasonable ground to defend the action of dower, and that the learned judge should have so told the jury; that the ground taken for the defence was clearly untenable, and this brings the case clearly within the rule that "no person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend," *Short v. Kalloway*, 11 A. & E. 29. He urged that the plaintiff's ground of action was, that he had paid money to be relieved of this claim, and having so alleged, he must prove it; that such was his ground of action; he had not simply averred a liability to pay costs, and to be evicted, but had made the payment the special ground, that not having paid himself, he could not sustain the action. He admitted, however, that this ground was not taken at the trial, and proposed to amend his pleadings to raise this point, if

necessary. He referred to *Richardson v. Chasen*, 10 Q. B. 756.; he also referred to *Booth v. Starr*, 1 Connecticut Reports, 244.

RICHARDS, C. J.—Under the facts proven at the trial, I think the defending of the dower suit on the ground that the certificate on the back of the deed, from testator to Allan, shewed that testator's wife had released her dower, was not justifiable, when it clearly appeared that the wife was no party to the deed; and that the costs of defending the dower suit and the costs of that suit ought not, as the facts appeared at the trial, to be found against the defendant. The case was, however, left to the jury, and they are the proper parties, I apprehend, to decide upon the reasonableness or unreasonableness of the defence of the suit. In *Collen v. Wright*, 7 E. & B. 301, *Crompton, J.*, said, "it seems to be a question for the jury whether it was reasonable for the plaintiff to institute the suit," and in giving judgment, he said "the facts that we have before us do not appear to me to show want of caution; so I should say as a jurymen."

As to the amount paid for the release of the dower, there is no doubt the thirty pounds was paid to procure that release. The allegation in the declaration is, that plaintiff was forced to and did pay the said Mary Maria Johnson, to wit, \$1000 in satisfaction of her dower. The instrument produced, signed by her, acknowledges the receipt of the amount from him, and releases her dower and claim in the land to him. It is true Mr. Boulton paid the money, but it does not distinctly appear whether it was to procure the release so as to discharge himself from liability on his covenant to plaintiff, or whether at the request of the plaintiff, with the understanding that plaintiff was to sue on the covenant for Mr. Boulton's indemnity, or whether it was by mutual understanding with plaintiff and Mr. Boulton, that the latter would pay the money and get the release for plaintiff. Mr. Boulton stated he advised plaintiff to defend the action, as the real liability rested on him. The only plea by defendants as to the deed and the damages, except what may effect their personal liability as executors, being *non est factum*, it

seems to me the payment of the money to procure the release is admitted, and the only question is the amount, and that is shown by the release and the evidence; see *Richardson v. Chasen*, 10 Q. B. 756.

On the whole, I think, under the evidence and pleadings, plaintiff entitled to recover the £30, and interest from the 23rd August, 1862. I think that as to the costs, the jury should have been told that the reason suggested afforded no reasonable ground for defending the dower suit. If the plaintiff will consent to reduce his verdict to £32 5s., it may stand, otherwise the rule will be absolute for a new trial without costs.

Per cur.—Rule accordingly.

VANDELINDER V. VANDELINDER.

Ejectment—Deed poll—Mortgage—Legal estate passed.

Held, that a deed poll to secure a sum of money in which the words passing the estate were “mortgage all that certain parcel of land, &c., to have and to hold the aforesaid land unto the said J. R., his heirs, executors, administrators and assigns,” was sufficient to pass the right of possession to the grantee.

EJECTMENT to recover possession of the front 40 acres of the east half of lot No. 14, in the 3rd concession of the township of Mountain, in the county of Dundas. The plaintiff’s notice of title stated that he claimed the same by virtue of a conveyance by way of assignment of mortgage to him from John Rennick, who claimed the same under an indenture of mortgage from one Joseph Péré.

The defendant appeared and defended for the whole land claimed, and besides denying the plaintiff’s title, he set up title in himself by deed from Joseph Péré to him, the defendant.

The cause was tried at the last Cornwall assizes, before *J. Wilson, J.*, when a verdict was rendered for the plaintiff, with leave reserved, to the defendant to move to enter a nonsuit in case the court should be of opinion the plaintiff was not entitled to recover upon the construction of his deeds produced. Accordingly, in last Michaelmas Term, *Kerr* moved for and obtained a rule *nisi*, to which *S. Richards, Q. C.*, during this Term, shewed cause, and contended

that the mortgage of the 18th of April, 1860, from Joseph Péré to John Rennick, was a deed poll by which for better securing the latter in the sum of \$601 31, payable in certain instalments with interest at 12 per cent, the former did thereby "mortgage all that certain piece of land, &c., to have and to hold the aforesaid lands, &c., unto the said John Rennick, his heirs, executors, administrators and assigns." The instrument then proceeded—"the condition of the above mortgage is, that if payment is made by Joseph Péré then this mortgage shall be void, and hereby giving and granting unto the said John Rennick, his heirs, executors, administrators and assigns, full power and authority to sell the aforesaid lands and premises, or a sufficient portion of the same to satisfy the aforesaid payments, &c., and in case the property so mortgaged is not redeemed, the said John Rennick, or his legal representatives, may sell the said lands and premises, and grant to the purchaser or purchasers a good and sufficient deed or deeds of conveyance in law of the said premises in fee simple." And the question was, whether that instrument conveyed any title or estate in the land to John Rennick, and whether the word "mortgage" in the following words, "I do hereby *mortgage* all that land," is a good operative word of transfer? He cited *Nicholson v. Dillabough*, 21 Q. B. U. C. 591; *Watt v. Feader*, 12 C. P. U. C. 254; 4 Cruise's Dig., ch. 4, sec. 36; also ch. 19, secs. 38, 39, [the American edition of 1834]; *Goodtitle v. Bailey*, Cowper, 597. At any rate the assignment executed by Rennick to the plaintiff was a good execution of the power of sale under this document, which clearly conferred a power.

Kerr, in support of the rule, referred to *Doe dem. Ross v. Papst*, 8 Q. B. U. C. 574; 4 Cruise's Dig. ch. 21, secs. 67, 73, 75, 76; also ch. 9, secs. 4, 19, 22, 23, 26; Wood's Conveyancing, 212; Touch. 76, 221, 517; Watkins on Conveyancing, 355, note; *Doe dem. Meyers v. March*, 9 Q. B. U. C. 242; *Bartels v. Benson*, 21 Q. B. U. C. 143.

ADAM WILSON, J.—The case in our own court of *Ross v. Papst*, 8 Q. B. 574, is, in some respects, very similar to the

present one. There the lessor of the plaintiff conveyed the land in fee to the defendant, and the defendant for securing the payment of a certain sum therein mentioned, agreed as follows, that is to say, and for securing the said sum the defendant "doth hereby specially bind, oblige, mortgage and hypothecate the said land above described and hereby granted." And the Chief Justice said "it cannot be held that any estate passed to the plaintiff by these words—they shew an intention to create a charge or lien, but they pass no interest. *Hypothecate* is a term proper to the civil law, and contemplates possession of the thing pledged remaining with the debtor. We cannot hold that under these words an estate was reserved to the plaintiff or passed to him by grant from the defendant. Unless we could hold that if A. should execute a deed by which he declared that he thereby *mortgaged* certain lands to B. for a certain time, without other words of limitation, B. could set up the deed as creating an estate in him, which entitled him to disposses A." The decision then is that *hypothecate* passed no estate, and that *mortgage* did not either *without other words of limitation*—are there then, in the case in hand, these *other words of limitation*?

Joseph Pére did thereby *mortgage* the land to Rennick, "to have and to hold the same unto Rennick, his heirs, executors, administrators and assigns." The other words of the instrument are rather words of a power being granted than of any interest being passed by them. It speaks however "of the property so mortgaged." There can be very little doubt that the parties intended to execute an instrument which would pass the fee simple of the land by way of mortgage, and this purpose should be given effect to if it can be done consistently with the rules of law. We have here certainly "the other words of limitation," which the Chief Justice thought might create and pass an estate in the land expressed to be *mortgaged*, and although no other operative word was used to create or to pass such an estate than the word *mortgage*; we conceive this to be an authoritative expression of opinion in favour of the validity of this instrument, even if it be not a direct decision of the point. It is an established rule that a deed shall never be laid aside as void, if by any construc-

tion it can be made good. Hob. 277; Doe dem. Wilkinson v. Tranmer, 2 Wils. 78. As where one granted land in fee to his kinsman, but a person who was not the tenant made the attornment, and so the land could not pass that way; it was adjudged that as the deed was made to a relative it might operate as a covenant to stand seised. Sanders v. Savile, 3 Lev. 372. So a deed made by way of bargain and sale to a daughter, which failed as such for want of a money consideration, was held to operate as a covenant to stand seised. Crossing v. Scudamore, 1 Vent. 137. So a feoffment to a relation, which was not accompanied with livery, was held to operate as a covenant to stand seised. Tomlinson v. Deighton, 1 P. Wms. 163; 2 Wm. Saund, 96, (a) note (1). The words "limit and appoint" may operate as words of grant, so as to pass a reversion. Shove v. Pincke, 5 T. R. 124. The proper words of a grant [it is said in 4 Cruise's Dig. Title XXXII. "Deed," ch. 4, sec. 37,] are *dedi et concessi*, but any other words that shewed the intention of the parties will have the same effect. Thus where A. entered into an article with B. by which he granted and agreed that in consideration of a certain rent, B. *should have* a way for himself and his heirs over certain lands of A.; this was held to be a good grant of a right of way, not merely a covenant for enjoyment; Citing Holms v. Seller, 3 Lev. 305. See also Sorrell v. Grove, Vin. Abr. "Grant's" H. 7 pl. 8.

If the words *shall have*, and *limit and appoint*, are good words of grant, I think it will be found there is quite sufficient in the deed in this case to pass the land according to the plain intent of the parties, which we should try to give effect to. "Mortgage" is a term well known to the law, it is described in *Termes de la Ley*,—"when a man makes a feoffment to another on condition that if the feoffor pay the feoffee at a certain day a sum of money, then the feoffor may re-enter, and in this case the feoffee is called tenant in mortgage." And when the owner says, "I mortgage my land to have and to hold the same to A. B., his heirs and assigns, as security, &c." The intent is plain not only that the land shall be mortgaged or charged with the debt, but that A. B. is *to have and to hold* the land itself in fee in security for the

payment of the debt. A declaration that the party mortgages his land would pass nothing, it would be a declaration quite ineffectual for any purpose at law, but when he says in addition to this, "and you A. B. [the creditor] are to have and to hold the land in fee in security," there is something more than a mere declaration to create a charge, there is a direct charging of the land by the creation of an estate upon which the charge can take effect, and which the party himself afterwards describes in this document, as the "property so mortgaged."

It is true the tendency of maintaining such loosely drawn documents may be to encourage ill-drawn and carelessly worded instruments; but this we cannot help. We should do infinitely more harm by trying to establish a stereotyped form of conveyance, and by compelling every such document to be conformable to this standard at the peril of its being vacated if it varied from it in any respect. The law must be adapted to common exigencies, for it has been well said by *C. B. Pollock*, in *Renshaw v. Bean*, 18 Q. B. 112, the law is a practical and not a pure science.

We think the defendant's rule should be discharged, and the *postea* be delivered to the plaintiff.

Per cur.—Rule discharged.

DAUPHIN ET AL V. LESPERANCE.

Covenant—Bond—Equitable plea—Defective Title.

The declaration was on a covenant contained in a mortgage, to which the defendant pleaded equitably that the plaintiffs gave their bond, binding themselves to execute a good and sufficient deed of the premises comprised in the said mortgage to the said plaintiffs, and alleging that plaintiffs have not delivered to defendant a deed in fee simple, &c., and averring that the plaintiffs had not at the time of giving their bond, nor at any time since, a good title to the said land, &c., to which the plaintiffs demurred.

Held that the plea was bad, as it did not shew what defect there was in the plaintiffs' title, nor that the plaintiffs' bond would not fully indemnify defendant against loss, nor that there was any fraud or misrepresentation; and as this court could not do ample justice between the parties, they would not interfere.

The declaration alleged that the defendant on the 11th of June, 1863, by deed covenanted to pay the plaintiffs the sum of \$580, and interest at six per cent., on the fifteenth of September thereafter, and that he did not pay the same.

The defendant pleaded an equitable plea.

That the plaintiffs, by their bond of the 23rd December, 1860, bound themselves under a penalty of \$1800, to convey or cause to be conveyed, upon the request of the defendant, by a good and sufficient deed in fee simple to the defendant, free from all incumbrances whatsoever, Lot No. 11 in the 1st concession of the township of Maidstone, containing 200 acres, more or less; such deed not to be delivered, but subject to the payment of \$700, to be secured to the plaintiffs by a mortgage on the said land, duly to be executed to the plaintiffs at the delivery of the above-mentioned deed.

That the defendant did accordingly, on the 11th of June, 1863, execute and deliver to the plaintiffs a mortgage on the said land [which is the mortgage now sued on], securing them in the balance of the \$700, then remaining due and unpaid, and demanded a deed of the said land in pursuance of the said bond, but the plaintiffs did not, nor have they since delivered to the defendant a good and sufficient deed in fee simple of the said premises; and the defendant further avers that the plaintiffs had not, at the time of giving their bond, nor at any time since, nor have they now any good and sufficient title to the said land or any part thereof, by reason whereof the plaintiffs have no right to call on the defendant for payment of the principal and interest mentioned in the mortgage.

The plaintiffs demurred to this plea, for this, among other reasons: That the due delivery of the mortgage was not denied; nor was any fraud alleged respecting the same; nor was it shewn that the plaintiffs were not entitled to the mortgage at the time of its delivery:

That the plea did not deny the lands mentioned were conveyed to the defendant by the plaintiffs, or that the plaintiffs have procured a conveyance thereof to the defendant by other persons, as mentioned in the bond:

That the plea did not show facts which would entitle the defendant to a perpetual injunction in Chancery:

That the plea shews only a failure of consideration:

That the defendant has a right of action against the plaintiffs, if they have not kept their bond or covenant.

Douglas, for the demurrer, cited *Whitehouse v. Roots*, 20 Q. B. U. C. 65, 78.

Blain, contra, referred to *Dittrick v. O'Connor*, 7 Q. B. U. C. 448; *Tisdale v. Dallas*, 11 C. P. U. C. 238; *Gibson v. D'Este*, 2 Y. & C. ch. 542; *Carew's case*, 7 DeG. M. & G. 43.

ADAM WILSON, J.—The defendant's plea is in effect that the plaintiffs were bound to convey by a good and sufficient deed, the land in fee, free from incumbrances, to the defendant; but the deed was not to be delivered until the defendant gave to the plaintiffs a mortgage upon the land to secure the unpaid purchase money; that the defendant did accordingly execute and deliver the mortgage, which is the one now sued on, and he then demanded a deed from the plaintiffs according to the bond, yet the plaintiffs have not delivered to the defendant a good and sufficient deed in fee simple.

From the plea, it appears the plaintiffs did deliver the deed to the defendant, upon which he delivered the mortgage to them.

It is nothing more than the common case of a sale and purchase, in which the vendee, instead of looking into the title he is getting before he concludes his bargain, takes the deed and relies on the covenant (or in this case on the bond) of the vendor for his security and indemnity.

The vendee asks us to stay all recovery against him, and yet leave the deed in his hands and the mortgage in the plaintiffs' hands, while we have not the power of ordering the restoration of the title and of the conveyances, or the restitution of the possession of the land to the plaintiffs, or of making anything like a just settlement between them.

The defendant does not show what the nature of the defect of title is, nor that he had not notice of it when he bought and delivered his mortgage, nor that the plaintiffs' bond will not be a full indemnity to him for all that he has lost or may lose; nor that he cannot easily and reasonably perfect the title himself; nor that he has ever been disturbed in the possession, or is ever likely to be; nor that there was any kind of fraud or even of misrepresentation; but he insists he shall not be called upon to pay because, as he says, "the plaintiffs had not at the time of giving the bond, nor at any time since, nor have they now, any good and sufficient title to

the land, or any part thereof." And all this may be perfectly true, and yet it may not cost five shillings to make as good a title as could be desired.

If the plaintiffs had made a mortgage upon this land, to some one, many years ago, and had paid off every farthing of the money, and had got the mortgage into their own keeping, and had only to ask for in order to obtain a certificate of payment for the purpose of registry, the plaintiffs perhaps (see *Kennedy v. Solomon*, 14 Q. B. U. C. 623,) could not be said, if they had allowed any of the days of payment to go by without strictly making the payment, to have had a good and sufficient title in fee simple to the land. And upon a case which may be this, or even less than this, without the slightest information of any kind, of any facts upon which we can judge of his equity, he asks us to stay the plaintiffs from collecting any portion of their debt against him, which may exceed by some hundreds of times the sum which it might take to perfect his title.

It may also be true that the plaintiffs had not any good and sufficient title to the land, and yet the defendant may have got a good and sufficient deed in fee simple ; for the plaintiffs might have caused the land to be conveyed to the defendant by some other person who had the title.

I very much question whether in any case of this nature relief can be given in this court ; for, however true the defence may be, we cannot, as our equity jurisdiction is understood, direct a reconveyance of the title to be made to the vendor, or impose any other terms upon the parties, which may be very proper to be imposed by a court having the means and the jurisdiction to make a final and definite settlement ; our partial interference would do more harm than good.

We see now, so far as the pleadings state a case, no clear or at any rate, no certain wrong done, or none which may not be adequately recompensed, and by the very means, too, which the defendant undoubtedly accepted as sufficient, when he entered into and when he concluded the bargain.

Judgment must be rendered for the plaintiff on the demurrer to the plea.

Per cur.—Judgment for plaintiffs on demurrer.

DEWAR ET AL. DEFENDANTS, APPELLANTS, V. CARRIQUE,
PLAINTIFF, RESPONDENT.

Judgment—Costs—Revision of—Execution—Want of reasonable and probable cause for enforcing same—Demurrer.

The declaration stated, that defendant, S., recovered a judgment in the Queen's Bench against the now plaintiff, for one shilling damages, and that the taxing master of the court improperly allowed the costs of the now defendant, S., at £39 3s. 1d., for which judgment was entered. Proceedings were afterwards taken, and the costs were revised and allowed at £11 3s. 9d., and that for the latter amount, S. was entitled to execution. Yet the defendants wrongfully and maliciously, and without reasonable and probable cause, caused a *fi. fa.* to be enforced by the sheriff for £39 3s. 1d.

Demurrer, because the declaration did not allege that the judgment was altered, &c., or that the amount was levied on an execution improperly sued out, &c.

Held, that the declaration as framed was sufficient, and that plaintiff was entitled to recover thereon.

This was an appeal from the County Court of the County of Halton, for a judgment on demurrer to the declaration, given in favor of the plaintiff below.

The declaration stated that Spiers, for whom his present co-plaintiff Dewar was acting as his attorney in an action in the Queen's Bench, in which Spiers was plaintiff and Carrique defendant, recovered in the action one shilling damages, and that the taxing officer erroneously and improperly allowed Spiers the sum of £39 3s. 1d. costs, for which judgment was entered, and that such proceedings were afterwards had, that the costs were reviewed, and the master moderated and allowed to Spiers costs at the sum of £11 3s. 9d. only, and certified that this sum was the full amount of judgment in this cause, and that for that amount only Spiers was entitled to execution, of all of which the defendants had notice.

Yet they wrongfully and maliciously, and without reasonable or probable cause, caused a *fi. fa.* [which they had before then sued out] to be acted on by the sheriff for £39 3s. 1d., although they well knew that £11 3s. 9d. was all they were entitled to by virtue of the judgment; whereupon the sheriff seized and sold under the execution the goods of the plaintiff of more value than the amount that Spiers was entitled to under the judgment, and the plaintiff also lost, &c.

Spiers and Dewar pleaded separately.

Spiers also demurred to the declaration ; the substance of the demurrer being that the declaration did not allege the judgment was altered, or set aside, or varied, or that the amount was levied on execution improperly sued out, or without a judgment to support it.

Dewar stated the same exceptions, and added : that the master could not by his certificate alter the effect of the judgment ; and, that he, this defendant, could not be held liable for enforcing a judgment remaining of record unaltered and unsatisfied.

Dewar also pleaded, Firstly, that no proceedings were ever taken in the Queen's Bench whereby the judgment was altered or reduced in amount ; and, thirdly, that the costs were reviewed by the master, and £2 15s. 7d. only deducted upon such review, and the *fi. fa.* was not enforced for the £2 15s. 7d., and no proceedings for reviewing the execution or reducing the costs were ever lawfully had or taken except as aforesaid.

Spiers pleaded a second plea as follows : that the seizure and levy of the goods of the plaintiff was under a *fi. fa.* issued on a judgment which was, at the time of the seizure, levy and sale, in full force against the plaintiff.

The plaintiff demurred to Dewar's first and third pleas, and also to Spiers' second plea, for that his complaint is not for any irregularity in the judgment or execution, but for wilfully, &c. causing it to be enforced for too large an amount.

The Judge of the court below held, that the declaration stated a good cause of action ; that the case of *Reid v. Ball*, 15 Q. B. U. C. 568 was the same in principle as the present ; he also referred to *Churchill v. Siggers*, 3 E. & B. 929 ; *Locke v. Wilson*, 6 Q. B. U. C. 600 ; *Auckland v. Adams*, 7 do. 139, as in favor of the plaintiff.

The case was argued during last Term. *C. S. Patterson* for the appellants, referred to *Brown v. Jones*, 15 M. & W. 191 ; *Prentice v. Harrison*, 4 Q. B. 852 ; *Rankin v. de Medina*, 1 C. B. 183 ; *Codrington v. Lloyd*, 8 A. & El. 449 ; *Bullen and Leake's Prec.* 653.

McMichael, contra, referred to *Saxon v. Castle*, 6 A. & El.

652; Leyland v. Tancred, 16 Q. B. 664; Porter v. Weston, 5 B. N. C. 715; Heywood v. Collinge, 9 A. & El. 269; Barber v. Daniell, 12 C. P. U. C. 68.

ADAM WILSON, J.—Upon the authorities it is well settled that an action will not lie against a party or his attorney for enforcing a judgment by execution against the debtor's person or goods for the full amount of the judgment, although it has been reduced by payments made since judgment entered, and although the person or goods of the debtor has or have been taken in execution for such larger sum; because the party's remedy is only to the equitable powers of the court to obtain relief, and "*prima facie*, the plaintiff has a right to take out execution upon an unsatisfied judgment for the amount recovered."

The complaint in such a case is only "that the party has levied for too much," which is not actionable.

But when in addition to this levy for too much, it is alleged that the larger claim has been made "maliciously, and without reasonable or probable cause," *these* facts constitute *the cause of action*, and the excessive claim is only a circumstance to be taken into consideration in the action.

The cases of De Medina v. Grove, 10 Q. B. 152, 172; Churchill v. Siggers, 3 El. & Bl. 937; Gilding v. Eyre, 10 C. B. N. S. 592; and Barber v. Daniell, 12 C. P. U. C. 68, fully establish this.

The question then here is, whether it appears the plaintiff was claiming for too much, and seized for too large a sum; the declaration containing the proper averments of malice and want of probable cause?

The judgment was entered for £39 3s. 1d. costs. These costs were reviewed, and on such review the master allowed them at £11 3s. 9d., and certified that this was the full amount of the judgment, and that for that amount only Spiers was entitled to execution; but the judgment itself was not altered, and continued to stand, and still appears to stand at the original sum, notwithstanding such reduction upon review.

If, therefore, this declaration were founded only upon the

seizure for too much, omitting all allegations of malice, &c. no action could have lain against these defendants; but as malice, &c., are alleged, does it or does it not sufficiently appear that they have levied for too much, although the judgment has not been reduced or corrected?

In the case of *payments* reducing the amount of the judgment no reduction appears either by the roll or by the execution, why then should a different rule prevail as to these costs so taxed off?

We know as a fact that the master is the proper officer of the court to settle what the quantum of costs shall be; and this he has done, although the roll has not been corrected. No doubt, upon these facts relief would be afforded by the court, in the exercise of its equitable powers, but upon what ground? Upon the ground that the judgment creditor was entitled to no more than the amount allowed by the master. Now, in such a case, if the defendants, knowing that they are not entitled to more than the reduced sum, proceed "maliciously, and without reasonable or probable cause," to enforce payment of the larger sum, why should they not be liable for this *malicious* proceeding, although they are not responsible for the merely excessive demand and seizure?

The case of *Saxon v. Castle*, cited in the argument, was also a case where the costs included in the judgment were reduced on a review, and there the judgment roll does not appear to have been altered, yet an action was held to be maintainable in that case.

I think, therefore, that the reduction of the costs included in the judgment by a re-taxation, does prevent the creditor from claiming more than the reduced amount, although the judgment has not been corrected to correspond with the last taxation, and does subject the creditor and his attorney to an action, for enforcing such larger sum, by seizure of the debtor's goods under an execution, when it is alleged that such proceedings are conducted "maliciously, and without any reasonable or probable cause." This view is also supported by *Johnson v. Harris*, 15 C. B. 357, where judgment technically was *recovered* for £500, but to secure the sum of £16, and the court held that the £16, being the sum upon

payment of which the defendant would be entitled to be discharged, must be considered to be the sum recovered.

The plaintiff has apparently dropped the *shilling damages*, in his computations, but I am not disposed to notice this, for by intendment the sums may perhaps be read as correctly stated.

I therefore think the declaration states a sufficient cause of action. For the reasons already stated, I think Dewar's first plea, and Spiers' second plea, bad; as to Dewar's third plea, I do not see why this should not be a good defence.

He says no proceedings were ever had or taken for reviewing the costs, than the one which he speaks of in his plea, when £2 15s. 7d. only was deducted from the costs included in the judgment.

This surely is a traverse of the alleged review in the declaration stated to have taken place, and appears to be fully warranted by the case of *Saxon v. Castle*.

I think, then, the judgment of the learned judge of the court below should be affirmed, excepting as to his judgment upon the demurrer to Dewar's third plea, and as to that, his judgment should be reversed, and judgment be directed to be entered thereon for the defendant Dewar.

JOHN WILSON, J.—The plaintiff, in his declaration, in substance alleges that the defendant, Spiers, recovered a judgment in the Court of Queen's Bench for one shilling damages, and £39 3s. 1d. costs, and thereupon issued a *fi. fa.* against the goods of Carrique, and so far the conduct of the defendants is not questioned, but he says that afterwards, and before this *fi. fa.* was put in force, on a revision of taxation, the costs were reduced to £11 3s. 9d.; yet that after this revision, and notice of it, the defendants wrongfully and maliciously, and without reasonable or probable cause, enforced the *fi. fa.* for the greater instead of the less sum whereby his goods were sold and he was damnified.

Had there been no express decision on the point, we should have had no doubt of the plaintiff's right to recover for the injury of which he complains. True, there was an existing judgment and writ of *fi. fa.*, but the right to enforce this

judgment to the extent they did, had ceased, nevertheless they did wrongfully enforce it.

In the case of *Churchill v. Siggers*, 3 El. & B., 929, it seems in the argument to have been conceded that if the case had been the enforcing of a *fi. fa.* against goods, instead of a *ca. sa.* against the person as in that case, there would have been no doubt as to the plaintiff's right to maintain his action. There it was argued, be it for a large sum or a small one, the plaintiff was liable to arrest, and the amount made no difference; but it would have been otherwise with a *fi. fa.* against goods, for if the execution was endorsed to levy a large sum, the sheriff would take goods sufficient to satisfy it, whereas, if the sum had been small he would but seize enough to satisfy it. The court held, that the action would lie for maliciously endorsing the warrant to arrest for an amount more than was due, for it made a great difference to a man in procuring his release, whether he was arrested for a large or a small sum. The cases in *Locke v. Wilson*, 6 U. C. Q. B. Reports, 600; *Auckland v. Adams*, 7 do. 139; and *Reid v. Ball*, 15 do. 568, affirm the same principle. On the authority of these cases, as well as on our own opinion of the plaintiff's right to maintain his action on the grounds he states, I am of opinion the declaration is good in substance, and I concur in the judgment of my brother Wilson.

Per cur.—Judgment in the court below affirmed except as to Dewar's third plea, upon which the appeal is allowed.

DUFFIL V. DICKENSON.

Appeal—Bond—Judgment.

Held, that the right to appeal from a decision of a judge of the County Court must be exercised before the entry of judgment in the cause. A bond having been allowed, and the appeal books set down for argument, after judgment entered, the case was struck out upon motion to that effect.

R. A. Harrison, in last Trinity Term, obtained a rule calling upon the appellant to show cause why the appeal in this cause should not be dismissed by this court with costs, or be struck out of the paper with costs:

1. Because final judgment was regularly entered, and

execution regularly issued in this cause in the County Court, before the appeal bond was allowed or any proceedings had by the appellant with a view to the appeal of this cause; which judgment and execution are still in force.

2. Because no grounds of appeal have ever been filed, served, or stated, in said appeal books, and no grounds are disclosed in the affidavits or papers filed.

The affidavit on which the rule was moved, stated: That judgment was entered on the 7th of May last, and an execution issued thereon the same day; that the appeal bond was filed on the 23rd of the same month, and that the appeal was set down on Saturday, the 30th of the same month, in this Court to be heard, on the first Saturday of Trinity Term thereafter.

M. C. Cameron, Q. C., shewed cause this term.

R. A. Harrison supported the rule.

The following authorities were cited: *Murphy v. The N. R. Co.* 13 C. P. U. C. 32; *Simpson v. G. W. R. Co.* 17 Q. B. U. C. 57; *Smith v. Foster*, 11 C. P. U. C. 161; the Cons. Stat. of U. C. ch. 15, ss. 67, 68; the Rule in 22 Q. B. U. C. 106.

ADAM WILSON, J.—The decision in 13 C. P. 32, is that in the case of a judgment entered on the 30th of January, and an appeal bond put in on the 2nd of February, the judge of the County Court could not be compelled to certify the proceedings by way of appeal to this court, under the statute, as “the right to appeal should be exercised before the entering of the judgment.” This is a decision expressly in point, and here the delay has been much longer. The appeal must therefore be dismissed with costs.

Per cur.—Appeal dismissed.

YOUNG ET AL V. MODERWELL, SHERIFF.

Sheriff—False returns—Surprise.

In an action against a sheriff for a false return, the judgment debtor, on whose suit the return was made, being examined, testified to facts upon which the verdict was rendered, and which the defendant afterwards said, took him by surprise.

On motion for a new trial,

Held, that the defendant should have gone to trial prepared to shew all transactions with the judgment debtor in relation to the suit, which not having done or sworn on this motion to what he could prove as facts to warrant a finding in his favor if a new trial should be granted, the rule was discharged.

This was an action for a false return by the defendant as sheriff, to a *fi. fa.*, in a suit of the plaintiff against one Thomas N. Daly.

The trial took place before the Chief Justice of this court, at the last Hamilton assizes, when a verdict was rendered for the plaintiff, and £165 damages.

Freeman, Q. C., last Michaelmas Term, moved for and obtained a rule calling upon the plaintiffs, to show cause why a new trial should not be granted on grounds disclosed on the affidavits filed, stating that the evidence of Thomas M. Daly was untrue, and that the horses, waggons and road plant seized by the defendant, were seized and sold, and the money applied on an execution at the suit of the Bank of Upper Canada; and that the defendant was taken by surprise at the plaintiffs' claiming for such property.

The only affidavit filed was that of the defendant, who stated: That it was not true, as Daly testified, that he paid to him, deponent, on the plaintiffs' execution £39 or any other sum above the sum he had been credited with.

That the £100 mentioned by Daly as having been received by deponent on the sale of horses and chattels, was received by deponent on the execution of the Bank of Upper Canada against Daly, and before the delivery to deponent of the plaintiffs' execution, and the same was paid by deponent to the bank.

That the evidence of Daly with respect to these two sums took deponent by surprise, as deponent went to trial prepared only to shew that deponent was not liable to the plaintiffs for not seizing the stock in trade said to have been bought by Daly from Messrs. Woodbury & Sewell, and which deponent believed was the only cause of action which the plaintiffs had or pretended to have against deponent; and that in the event of a new trial, deponent will be prepared to give proof with respect to both sums, as before stated.

Burton, Q. C., this term, shewed cause, and cited *Cooke v. Berry*, 1 Wils. 98; *Tharpe v. Stallwood*, 6 S. N. R. 715;

Doe d. Wheeler v. McWilliams, 4 Q. B. U. C. 30 ; Prout v. Pollard, 1 Q. B. U. C. 170.

Freeman, Q. C., supported the rule.

ADAM WILSON, J.—The execution debtor swore at the trial, he had paid the sheriff altogether £235 on this writ, and as the plaintiffs admit having received from the sheriff £200, there still remained £35 of these payments in his hands, if the jury believed this statement.

The learned Chief Justice directed the jury, that as to the plant, there was no legal evidence to shew that the amount produced by its sale was applicable to any other execution than that of the plaintiffs ; and as it realized more than £100, it may be that that sum is included as a part of the plaintiffs' verdict, and it rather appears that this is so ; for, while Daly says that he paid the sheriff £235 and their plant sold for 100

making together £335
the jury have found, after deducting the £200 paid to the plaintiffs, the sum of £165 in their favor, consisting no doubt of the balance of £135, and of £30 for interest.

We are not satisfied there is any proper ground of surprise made out. The defendant knew he was charged with neglect, in not seizing Daly's goods, and in not paying over moneys made from these goods ; he ought to have been prepared to have shown upon what facts and evidence he had acted, in treating, or in not treating the goods alleged to be Daly's as his, and in what manner he had applied all moneys received from Daly, or by sales of his property during the time in question.

The defendant in his affidavit filed, does not explain how he proposes to prove that Daly did not pay the £39 he mentioned, or how or why he applied the £100 relating to the plant to the execution of the bank, or how he proposes to prove the plaintiffs were not entitled to it ; further than that the bank execution had precedence to the plaintiffs' writ ; but the plant was during all the time the *fi. fa.* was held by the sheriff, in the actual possession of Daly, the execution debtor.

The ground of surprise must be very jealously entertained by the court, else everything will be called a surprise, and there will never be an end of litigation.

In the case referred to, of *Cooke v. Berry*, where a plea of accord and satisfaction was pleaded, and as the plaintiff believed, pleaded only as a sham plea, but the defendant succeeded upon it at the trial, the court would not afford relief because the plaintiff had full notice of what the defendant was about to prove.

Harrison v. Harrison, 9 Pr. 89, is also a very strong case in which the court would not grant a new trial, although the plaintiffs affidavits stated that the defendant's witnesses had been suborned by the defendant, that the defendant had tried to induce many others to say they had been present at conversations when the plaintiff had acknowledged the debt to be paid.

There were no facts gone into at the trial which should have been any surprise to the defendant. He was fully warned by the pleadings what it was the plaintiffs meant to charge him with, and we cannot say either upon the evidence or the charge which is not excepted to, that the jury have not found a verdict which was fully justified; at any rate we should have been told by the sheriff now what facts he relies upon as showing the wrongfulness of the verdict, and by which he proposes to contest the plaintiffs recovery upon any future trial; this he has not done.

Per cur.—Rule discharged.

CLEMENT V. CLEMENT ET AL.

Stat. 18 Vic., ch. 156, sec. 3—Application of.

Held, that the preamble and enacting clause of the Statute 18 Vic., cap. 156, apply to all that part of the Township of Niagara which lies between the east and west lines of the Township to the Queenston and Grimsby macadamized road, and should not be limited to the first concession only.

This was an action brought by the plaintiff for trespass by the defendants, upon a road allowance between lots numbers 110 and 111 in the township of Niagara, which the plaintiff claimed as his, by operation of the Statute 18 Vic. ch. 156, sec. 3. The cause was tried at the last assizes held at Niagara before the Chief Justice of this court, who non-

suiting the plaintiff, ruling that the act applied only to the first concession of the township, but reserving leave to the plaintiff to set aside the non-suit, if the court should be of opinion that it applied to the other part of the township in which the plaintiff's land was situated.

In the beginning of last term *Eccles* obtained a rule *nisi*, calling upon the defendants to shew cause why the non-suit should not be set aside and a new trial granted, on the ground that the learned Chief Justice was wrong in ruling that the act applied to the first concession only, and not to the township.

During the term *R. A. Harrison* shewed cause. He contended that the preamble showed, that the operation of the enacting clauses referred only to the first concession. He cited the act 18 Vic., ch. 156; *Quin v. O'Keefe*, 10 Irish C. L. R. 393; *The Queen v. The Guardians of the Poor, &c.*, 12 do. 35; *Hughes v. The C. & H. Ry. Co.*, 8 Jur. N. S. 221, S. C. 7 L. T. N. S. 197; *Dwarris on Stat.* 503 to 506, 659 to 663; C. S. C. cap. 5; sec. 6, s. s. 27-28; C. Stat. U. C. cap. 2, s. 19.

Wm. Eccles contra, contended that the statute 18 Vic. cap. 156, applied to the whole township north of the Queenston and Grimsby macadamized road, and south of the east and west line, and that the plain language of the statute applied to this part of the township.

JOHN WILSON, J.—This act is a public act, but its operation is local. The legislature must be presumed to have known the locality and the special circumstances to which its provisions were intended to apply. In construing it the court is bound to recognize the locality and the special circumstances which gave rise to the act, so far at least as they can be gathered from it and from the public survey of the township. The 28th sub-section of section 6, Con. Stat. of Can. ch. 5, expressly made applicable to the Con. Stat. of U. C. by ch. 2, sec. 19, gives us the rule of construction. "The preamble of every act shall be deemed a part thereof, intended to assist in explaining the purport and object of the act. Every act

and every provision or enactment thereof shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the act, and of such provision or enactment according to their true intent and spirit." "It will be found," says Dwaris, 658, "an established rule, in the exposition of statutes, that the intention of the law-giver is to be deduced from a view of the whole and of every part of the statute taken and compared together. In construing acts of Parliament the courts are not to look only at the language of the preamble, or of any particular clause. If they find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, &c., it is their duty to give effect to the larger expressions. Indeed a statute ought, upon the whole, to be so construed, that, if it can be prevented, no clause, sentence or word should be superfluous, void or insignificant."

On referring to the map of the township of Niagara put in, and on reading the preamble of the act, we infer that the township of Niagara was surveyed by Augustus Jones, a P. L. S. The line running easterly and westerly from the Niagara river to the township of Grantham, between the military reserve and that part of the township which was laid out into lots was, and is called the east and west line of the township, and was the base of the survey of Jones, parallel to which allowances for roads were made between every second lot from that line, through the township. He began his survey at the east and west line, and ran along the river, against the stream to the township of Stamford, leaving an allowance for road between every second lot, from this line, through the township. In this township, the lots are not numbered beginning with one, in every concession, but are numbered consecutively, along one concession, back on the next, along the third, back on the fourth, and so through the township, the last lot being No. 184. There were twenty-three lots in every concession, but in issuing the Patents, the numbers did not begin where the survey was commenced, but at the township of Stamford. If there had been an even number of lots in every concession, this change would have

made no difference between the allowances for roads as laid out on the ground, and the reservations for roads, between every second lot in the patents, but it happened at the time the letters patent from the Crown for the land in the township were issued, that the lots were numbered from the township of Stamford to the east and west line, the effect of which was to establish the road allowance between other lots than those between which they were established by the original survey. By reversing the mode of numbering the lots, the allowances for roads were between the even and the odd number by the patents, but on the ground they were found between the odd and the even number.

The Queenston Heights are on the southern part of the township. Along their base, from the Niagara river to the township of Grantham, a macadamized road had been constructed, called the Queenston and Grimsby Macadamized Road; commencing at the river, between lots 3 and 4, in the first concession, it passed along the south sides of lots 43, 50 and 89. In lot 96, it turned to the north-west, through 96, 97, and part of 134; it then ran along 133, 144, and 179, to the township of Grantham. The mention of the first concession in the preamble, we read as describing where this macadamized road began; between which road, and the east and west line of the township, the municipal council prayed that the said allowances, as originally surveyed, might be confirmed. The recital of the survey is, that the surveyor commenced at the east and west line, at the township of Niagara, and ran along the river to the township of Stamford, leaving an allowance for road between every second lot, and that many of the said roads are now opened and used in accordance with the said survey. Then the first clause enacts, "The said allowances for roads as laid out and established by the said original survey, shall be and the same are hereby declared to be the true and unalterable allowances for roads between the said east and west line, and the said Queenston and Grimsby Macadamized Road, in the township of Niagara, any thing in any letters patent to the contrary notwithstanding." The second clause makes it the duty of the municipal council to cause permanent stone

monuments to be planted, under the direction of a deputy Provincial land surveyor, at the several angles of the several alternate lots, between the east and west line and the said Queenston and Grimsby Macadamized Road, at the points of intersection of the said lots with the road allowances of the said township so established as aforesaid, as nearly as may be in the exact position intended by the said original survey.

The third clause enacts: From and after the time when the said survey so to be made under the direction of the said municipal council, shall have been approved of, and accepted by them, the allowances for roads, as reserved and established by the original letters patent from the Crown shall be and remain forever thereafter closed up. None of the enacting clauses in any way limit their operation to the first concession; nor does the clause authorizing the closing up of the allowances for roads as reserved and established by the original letters patent, and the vesting them, limit its operation to the first concession.

We read the preamble of the act as referring to all that part of the township of Niagara which lies between the east and west line of the township to the Queenston and Grimsby Macadamized Road, and we are of opinion that the preamble and the enacting clause ought to be applied to that part of the township, and should not be limited to the first concession only.

Per cur.—Rule absolute to set aside the nonsuit.

REFORD V. McDONALD ET AL.

Evidence—Taken by commission—Must be enclosed under hand and seal of commissioner—Affidavit verifying the proper taking of.

At the commencement of the trial of this case the counsel for the defendant not being present, the counsel for the plaintiff opened his case, and put in and proceeded to read evidence taken under a commission at Montreal—while it was being read the counsel for defendant appeared and objected to the commission, as the envelope enclosing it was not under the hand and seal of the commissioner, and because there was no affidavit of verification thereof. On the suggestion of the judge who tried the cause the plaintiff took a nonsuit, with leave to move to set the same aside on motion.

Held, that under sec. 21, ch. 22, Con. Stat. U. C., the examination of a witness taken without the limits of Upper Canada, must be proved by an affidavit of the due taking thereof, sworn, &c., and must be returned close under the hand and seal of the commissioner.

This was an action to recover damages for breach of con-

tract. The declaration stated that defendants contracted to sell and deliver to the plaintiff, and plaintiff contracted to purchase from defendants, a quantity of tobacco, known as the "*Anderson*" brand, at 33 cents per lb. Plea, never indebted, and issue.

At the commencement of the trial, which took place at the Fall Assizes for the City of Toronto in November, 1863, before *A. Wilson, J.* The counsel for the defendants was not present. The plaintiff began his case by putting in a commission which had been issued to Andrew Robertson, Esquire, to take the evidence of one Isaac Phillips, a broker at Montreal, on behalf of the plaintiff. The commission was opened, but while the contents thereof was being read the counsel for the defendants came in, and objected that the envelope enclosing the commission was not under the hand and seal of the commissioner, and that there was no affidavit of the due taking thereof. The learned judge sustained the second objection, and declined to receive the evidence, remarking that the first might be good, but it was not necessary to decide that point there.

The counsel for the plaintiff, went on, endeavouring to sustain his case on other evidence, but not being able to do so, in the opinion of the learned Judge, took a nonsuit in deference to his ruling, with leave to move against it in term.

In *Michaëlmas* Term last he obtained a rule calling on the defendants to show cause why the nonsuit should not be set aside and a new trial granted, on the grounds of misdirection of the learned Judge in ruling that there was not sufficient evidence of the contract declared on to go to the jury, and that the evidence taken under a commission in the case was inadmissible after the said evidence had been read without objection, and for rejection of admissible evidence, namely, the said evidence taken under the said commission, or why a new trial should not be granted on such terms as to the court might seem fit. And why the commission and evidence taken thereunder should not be returned to the commissioner in order that an affidavit of the taking of the said evidence might be appended thereto, and the commission

and evidence returned to this honorable court close under the hand and seal of the commissioner, and on grounds disclosed in affidavits filed.

In Hilary Term, *Galt*, Q. C., shewed cause, and contended that under the 21st sec. of ch. 32, Con. Stat. of U. C., the examination of a witness taken without the limits of Upper Canada, pursuant to a commission, must be proved by an affidavit of the due taking thereof, sworn before and certified by the mayor or chief magistrate of the city or place where the same was taken, and must be returned close under the hand and seal of the commissioner to the court. That neither of these requirements had been complied with, and that the evidence had been properly rejected.

H. Cameron in support of the rule contended, that it was too late to take the objections after the commission had been opened and read. He cited *Foss and Wagner*, 7 A. & EL. 116; *Hibbert v. Johnston*, 6 O. S. Q. B. 635, and *Farrel v. Stephens*, 17 Q. B. U. C. 250.

J. WILSON, J.—The well established practice is, that where the counsel in a cause allows to pass something, which, if objected to at the proper time, might have been fatal, he shall not afterwards be heard to object, and should be held as having assented to waive the objection. At the trial the learned judge allowed the plaintiff to open the commission, assuming it was in accordance with the statute. The moment the counsel for the defendant was aware of what was going on he promptly objected, and we think it would be too much to assume that he assented to waive the objections under the circumstances before us. We think the learned judge was right in rejecting the evidence. It had not been verified as the statute required, and the defendants counsel had done nothing from which his consent to waive the irregularity could be inferred. The rule will be made absolute for a new trial on payment of costs, and for leave to take back the commission for verification and proper enclosure.

Per cur.—Rule absolute.

PALSGRAVE V. MURPHY.

*Guarantee—Statute of Frauds—Consideration of guarantee must be stated—
Must be in writing.*

On an action brought by plaintiff against defendant on the following document, "I hereby guarantee to pay W. H., &c., \$10 per month until the sum of \$300 due by Messrs. B. & H., &c., shall be paid, &c. Signed, M. M." (the defendant.)

Held, that the consideration therefor, not appearing on the face of the guarantee or not to be implied therefrom, it came within the Statute of Frauds, being a promise to pay the debt of another without any consideration, and was therefore void.

Judgment was given for the defendant Murphy in this case in the County Court for the United Counties of York and Peel.

This was an appeal from the judgment of said court. The action was brought upon a guarantee in these words:—

"TORONTO, February 20th, 1863.

"I hereby guarantee to pay William Halley, agent for C. F. Palsgrave, the sum of ten dollars per week until the sum of three hundred dollars, due by Messrs. Boyle & Hynes, printers of the *Irish Canadian*, shall be paid, commencing on the twenty-eighth instant, each instalment of said amount to be endorsed on the back of this agreement.

(Signed,) "M. MURPHY."

The sole ground of appeal was, that the consideration did sufficiently appear on the face of the guarantee to entitle the plaintiff to maintain this action.

R. A. Harrison for the appeal contended, that on the face of it the writing implied that the consideration of the promise to pay, was forbearance to enforce the \$300 due the plaintiff by Boyle & Hynes, until it was paid by instalments of \$10 a week.

He cited *Edwards et al. v. Jevons*, 8 C. B. 444; *Shaw v. Caughell*, 10 U. C. Q. B. 120; *Bainbridge v. Wade*, 16 Q. B. 96, 98, 99, 100; *Haigh v. Brooks*, 10 Ad. & El. 309; *Butcher v. Stewart*, 11 M. & W. 857; *Tanner v. Moore*, 15 L. J. N. S. Q. B. 391; *Goldshede v. Swan*, 1 Ex. 154; *Powers v. Fowler*, 4 E. & B. 511; *Broom v. Batchelor*, 1 H. & N. 255; *Hoad et al. v. Grace*, 7 H. & N. 494; *Jenkins v. Ruttan*, 8 U. C. Q. B. 630; *Evans v. Robinson*, 16 do. 169; *Oldershaw v. King*, 2 H. & N. 399, s. c. 517.

McMichael, contra, contended, that no consideration whatever, even where the circumstances under which it was given were shown, could be implied from the writing, it was a promise to pay the debt of another, without consideration, and was void by the Statute of Frauds, and therefore the judgment of the court below ought to stand. He cited *Clancy v. Piggott*, 2 Ad. & El. 473; *Cole et al. v. Dyer*, 1 Tyr. 304; *Westhead v. Sproson et al.* 6 H. & N. 728; *Holmes v. Mitchell*, 7 C. B. N. S. 361.

J. WILSON, J.—The case of *Clancy v. Piggott*, 2 Ad. & E. 473, was an action brought on a writing in these words :

“ March 6, 1832.

“ MR. CLANCY,—I hereby agree to see you paid within three months from date hereof, the amount of £50, due to you on account of Mr. George Moore, jun., Sheffield.

(Signed,) “ J. W. PIGGOTT.”

Lord Denman, C. J., said the defendant is entitled to judgment. *Saunders v. Wakefield*, 4 B. & Ald, 596 is in point. The contract, as the defendant has represented it, is void for want of consideration.

Littledale, J., said the plea here, like the replication in that case shews an agreement to pay the debt of another without any consideration expressed in writing.

The legal effect of the writing in this case and that was identical.

Since that time the courts have construed contracts much more liberally, especially mercantile contracts. Parties have been allowed to give parol evidence of all the circumstances out of which contracts arose, with a view to give them effect and remove ambiguities. The greatest latitude was given in cases of guarantee, to enable the holders of them to give them effect, but we have been unable to find any case going so far, as the appellant contends for, in this cause. The guarantee is, in the simplest form, to pay the debt of another, but the Statute of Frauds requires not only the promise to pay to be in writing, but the consideration also. Now what was the consideration, was it forbearance to sue and enforce the contract as stated in the first count,

or was it that the plaintiff would forbear and give time to Boyle & Hynes for payment of the debt as in the second count? The writing is read in vain for an answer. Let us see if the evidence helps us. It was that Boyle & Hynes had bought printing materials from the plaintiff to the amount of \$370 in December, 1862, and were to pay therefor by a note to be endorsed by the defendant and others. Boyle & Hynes failed to give the note, and Boyle and defendant offered to pay it at the rate of \$10 per week. Then defendant gave the guarantee and never paid any thing on it. The plaintiff wanted the guarantee signed by the defendant and the other persons who were to have endorsed the note, but the defendant assumed the whole responsibility himself. There was no evidence that it was for forbearance, we rather think it was taken in payment or satisfaction of the debt. If so, it was a promise to pay for the debt of another without consideration, and was clearly within the statute.

In the case of *Westhead et al. v. Sproson et al.*, 6 H. & N. 723. One Piper being indebted to the plaintiffs the defendants gave them the following guarantee. In consideration of your agreeing at our request from time to time to supply on credit to Piper such goods as he may require and you may think fit to supply, we do hereby guarantee to you the payment of such sum as he now owes and may at any time from time to time owe to you. It was held that the guarantee did not bind the defendants to pay the existing debt, because the consideration failed, inasmuch as the plaintiffs gave Piper no further credit, and the promise to pay the existing debt was without consideration.

We are of opinion that the writing itself, and the circumstances under which it was given, do not support the consideration set up in either count of the declaration, but on the contrary show an undertaking to pay the debt or default of others, and was clearly void under the Statute of Frauds.

The appeal will be dismissed with costs.

Per cur.—Appeal dismissed.

SUTHERLAND v. DUMBLE.

Mortgage—Covenant—Service of process on wrong party.

In an action on a mortgage, the writ was served upon the mortgagor's father, who by his son (an attorney), entered an appearance and defended the suit, but no notice was given to or proceeding served upon the mortgagor, and a verdict was taken against him thereon.

Held, that the writ having been served upon the wrong person, and no notice or knowledge of the proceedings having been shewn to have reached the defendant, a new trial was ordered.

This was an action, brought on a covenant in a mortgage executed by Thomas Dumble, the younger, to the plaintiff, for \$900 and interest, being an instalment due on the 8th of August, 1863. The mortgage had been assigned to R. McFie, on whose behalf the action was brought. Thomas Dumble, the younger, lived at Oil Springs; Thomas Dumble, the defendant, is the father of the mortgagor, and lives at Cobourg; David William Dumble, the defendant's attorney, is the son of the defendant, and brother of Thomas Dumble, the younger.

Plea, non est factum. The case came on for trial at the Fall assizes, held in London, for the county of Middlesex, in 1863, before the *Chief Justice* of Upper Canada, when a verdict was rendered for the plaintiff for \$973 65: the evidence shewing that the mortgage was executed by Thomas Dumble, the younger.

In Michaelmas Term last, *R. A. Harrison* obtained a rule calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial had on the ground of misdirection in this, that the learned judge who tried the cause, refused to tell the jury that there was no evidence to show the making of the deed sued upon by the defendant who had been served with process; or why the said verdict should not be set aside, as being contrary to law and evidence in this, that the evidence did not warrant a verdict in favor of the plaintiff, against the defendant served with process; or why the said verdict should not be set aside, and a new trial had between the parties, or a *stet processus* entered, upon grounds disclosed in affidavits and papers filed.

On moving this rule, the affidavit of Thomas Dumble, the

defendant, was filed, stating that on or about the 21st of August, he had been served with a writ of summons in this cause, which he attached to the affidavit; that not knowing for what the action had been brought, he caused an appearance to be entered, and a defence to be put in to this action; that he had been informed it was brought to recover moneys due on a mortgage made by Thomas Dumble, the younger, to the plaintiff; that Thomas Dumble, the younger, is his son; that he never communicated to his said son the fact of the service of the writ upon him, and that he never signed his name Thomas Dumble, jr., nor did he know any person who did, except his said son.

Also, the affidavit of Thomas Dumble, the younger, stating that he had never been served with process, or with any pleading in this cause; that he never saw any of the pleadings or the writ herein; that he is the maker of the mortgage sued herein; that he is described in the mortgage as Thomas Dumble, the younger, and that his signature to it is Thos. Dumble, jr.; that before the 6th day of October last, a bill of foreclosure in Chancery, filed by the plaintiff's attorney, on the said mortgage, had been served upon him; that he had told the person who served the bill, that Thomas Dumble, the defendant named therein, lived in Cobourg, and that he, the deponent, was Thomas Dumble, the younger, whereupon the said bill was taken away, and afterwards, on the 6th of October last, was re-served upon him amended as to the defendant's name; that he never caused a defence to be entered to this action, and that he always signs his name Thos. Dumble, jr.

In Hilary Term, *M. C. Cameron*, Q. C., shewed cause. He put in the affidavit of Ronald McFie, stating that he was the assignee of the mortgage, which had been assigned to him in January, 1863; that after the assignment, he had written to Thomas Dumble, jun., and in reply had received a letter as from Thomas Dumble, the younger, written by David William Dumble, the attorney for the defendant in this cause, dated 30th July, 1863, stating that he had been notified that Sutherland had assigned the mortgage to him; that he believed the interest and instalment came due next

month, and that he would not be prepared to meet it ; that he was in the refining business at Oil Springs, and had a large stock on hand, but was waiting for the good prices of the next fall, and asking him to give about two or three months to pay the instalment, and he would pay good interest for waiting.

That he, McFie had again written to Thomas Dumble, the younger, and had received a letter in reply, dated 11th August, 1863, as from Thomas Dumble, the younger, but written by David William Dumble, the attorney, saying that he acknowledged the receipt of his (McFie's) letter, stating that if the money was not paid on Sutherland's mortgage by the 15th, he would put it in the hands of his solicitor ; that Mr. Dumble was then in the United States, and was expected back in about ten or twelve days ; that he could not effect service upon him, and it would be of no use suing, as he could not hasten payment ; that the price of oil was up, and was continually rising ; that he had a large stock on hand, but being desirous of making the most of it, he had not sold ; that he would sell as soon as he came back, when he would be paid ; that therefore, to save expense, and indeed to save himself time, he would ask him not to take any steps at law. This last letter was signed D. W. Dumble, attorney for Thos. Dumble, jr.

He put in the original writ, sued out on the 18th day of August, 1863, directed to Thomas Dumble, of the town of Cobourg, in the county of Northumberland, with the affidavit of service thereof by Oliver Oscar Benson, who in a subsequent affidavit stated that he served the writ in this cause ; that he was aware that the summons was to be served on Thomas Dumble, the younger, and went for the purpose of serving him, and discovered he was not in Cobourg ; that he went to his brother, the attorney for the defendant, and told him he had the summons for his brother, and asked him if he would accept service which he said he would do ; that he handed him the summons and copy, and he commenced to write on the original, and wrote the words, "I hereby accept service of within writ for"—and then said he would not accept service, and handed him the copy and summons ;

that he (Benson) told him (Dumble), that he would see if Dumble the younger's father would accept it for him (Dumble the younger); that he went, and told him he had a writ for his son, Thomas, and asked him to accept service, and he said he would, and he gave him the writ; that he (the father) understood it was for his son, Thomas Dumble, the younger. Also, the affidavit of Mr. Cornish, the plaintiff's attorney, stating that on the day before the verdict was taken, he informed Mr. Flock, who held the brief for the defendant, that the action was not against the elder Dumble, but the younger; that Mr. Flock appeared, and objected to the verdict being rendered, without shewing that the person who executed the mortgage was the defendant or the person served with process; that he (Mr. Cornish) then stated that the suit was not against the elder, but the younger Dumble, that he never knew how the service was made until after the record was entered; and that, although the defendant's attorney must have known, he never in any way informed him, and he believes it was done to cause the plaintiff to be put to costs, that a copy of a letter attached, is a copy of the letter in which the original summons was sent to the sheriff, in which the defendant is stated to be the younger Dumble. He cited the *Provincial Insurance Company of Canada v. James Shaw*, 19 U. C. Q. B. 360; *Emmons v. Crooks*, 1 Grant's Chy. Rep. 162; *Rhodes v. Innes*, 7 Bing. 329; *Williams v. Piggott*, 1 M. & W. 574; and contended that if such circumstances be shewn as to satisfy the court that the process came to the possession of the defendant, it is a personal service within the meaning of the C. L. P. Act, regarding personal service.

Harrison, in support of the rule, cited *Whitelocke v. Musgrove*, 1 Cr. & M. 511; *Jones v. Jones*, 9 M. & W. 75; *The Provincial Insurance Company v. Shaw*, 19 Q. B. U. C. 364, note in *Killens v. Street*; *Jarmain v. Hooper*, 6 M. & G. 828; *Childers v. Wooley*, 6 Jur. N. S. 444; and contended that this case was like *Killens v. Street*, and on the authority of that, and on the admission that the suit was not against Thomas Dumble, the defendant, the rule ought to be made absolute.

JOHN WILSON, J.—The law requires that a defendant shall be personally served with a copy of the process ; but the cases go thus far, that if this come to the possession of the defendant, although in an indirect way, in time for him to defend, the proceedings will be held sufficient to charge him. This is like the case of *Killens v. Street*. Here it is not shown that the copy of the process or any of the proceedings came to the knowledge of Dumble the younger, and therefore the rule will be made absolute to set aside the verdict, and all proceedings subsequent to the issuing of the writ, without costs.

From what is before us, we cannot fail to see much that is reprehensible in this defence, and much that is calculated to show that the defendant's attorney lent himself to that species of conduct so injurious to the profession. He is not now before us to answer, and how far the plaintiff is willing to overlook what has been done, is for him to consider.

The now defendant, the elder Dumble, was told the process was for his son, and the bailiff says he accepted it for his son. The attorney knew it was for his brother, for the bailiff swears he told him it was, and this is so far corroborated, by the words written upon the writ, when he was about to accept service of it for his brother. But we find that the father assumes the process is for him, and causes his son, the attorney, to appear for him, and this attorney deliberately appears for his father, pleads *non est factum*, and instructs his counsel to insist on proof that the person who signed the mortgage was the same as the one upon whom the process was served.

We think he, as well as the elder Dumble, knew, from first to last, that the action was not brought against him, the elder Dumble, on whose behalf and retainer he professed to have acted. The defence, so far as we now see it, was made to gain the time which he the attorney, had originally contended for on behalf of his brother, and to make the plaintiff chargeable with costs, which the candor due from one member of the profession to the other would have prevented.

It is safe and proper, that when gentlemen of the profession act for their nearest relatives, they should consider how

far, in cases of doubt, their judgments may be warped by feelings which, under other circumstance would reflect credit upon them.

Per cur.—Rule absolute for a new trial.

SCARLETT V. CORPORATION OF YORK.

By-law—Opening of road—Encroachments thereby—Quashing of by-law—Laches in application—Con. Stat. U. C., ch. 54, secs. 319-323.

The Municipality of the Township of York passed a by-law, causing a road to be surveyed and laid out, on the petition of the owners of the land in the neighbourhood, which passed through the plaintiff's land; and this motion is made to quash the by-law, on the ground that the road, as laid out, encroaches upon plaintiff's garden and outhouse, and also covers the ground upon which his toll-house stands. The plaintiff was heard in person by the municipal council as against the passing of the by-law authorizing the opening this road as laid out; and although he then objected to the opening of the road generally, he did not do so on the ground that it encroached upon his buildings or garden. By the affidavits, it appeared that this road had been opened a number of years before, by the plaintiff's father, and had been travelled as a public highway; it was of advantage to plaintiff, and that he had charged toll for travelling over it. It also appeared that the only building the road encroached upon was a small hen-house, of but little value, being about forty years old; it also passed over the ground occupied by the frame of a proposed toll-house. The old road as travelled varied in width from 29 to 65 feet and in defining the width of the road so to be opened, it encroached slightly on plaintiff's property.

Held, that under the circumstances of the case, as set out above, and doubting as to the *bona fides* of the plaintiff's opposition to the road, on the grounds taken on this application, and deeming that the public will be benefited by opening said road, and as the plaintiff will have his remedy for compensation for any injury sustained, the rule should be discharged without costs.

Semble.—Action for redress should be prompt, in respect of matters especially not apparent in the by-law, and should a plaintiff have allowed two terms to pass without any application, any redress might well be refused him on account of laches.

In Michaelmas Term, 1863, *R. A. Harrison* obtained a rule calling upon the defendants to show cause why a by-law of the said corporation, passed on the 18th day of May, 1863, entitled, "To open and establish a public highway in the township of York," should not be quashed, with costs, upon the ground that it authorizes an encroachment on the yard, garden, and out-houses of the applicant, John Archibald Scarlett, or why so much of the said by-law as authorizes the said last mentioned encroachment should not be quashed, with costs, upon the

ground aforesaid; and in the meantime that all proceedings be stayed.

The rule had been obtained on filing a copy of the by-law, properly verified, and on the affidavit of John Archibald Scarlett, stating that he was the owner of the lots numbers 7 and 8, in the third concession from the Bay (broken front), on the river Humber, in the township of York; that the road intended to be opened by said by-law, is composed in part of a road hitherto travelled, and in part of a new road, as shown on a plan. That the road on the plan marked as Scarlett's Road, was long since laid out by John Scarlett, the deponent's father, through lands in the townships of York and Etobicoke of his own, for his own accommodation; that this road leads from Weston to Dundas street, and is of irregular width, varying from 12 to 66 feet; that to keep control of it, and compensation for constructing it, John Scarlett, ever since its construction, had a toll-gate upon it, and there collected tolls from persons who used it; that this toll-gate was in that part of the road in the township of Etobicoke; that this land and the toll-gate had been conveyed by John to Edward Scarlett; that for many years, the deponent had been the owner of so much of the road as passed through lots 7 and 8 in the said third concession of York, on which he erected a toll-gate and received toll thereat; that the road intended by the by-law commences at the Weston Plank Road, and strikes the road laid out by John Scarlett at a point in lot 9, in the 3rd con. of York, and then continues along the last-mentioned road till it strikes Dundas street; that the first described part of the road leading to the road laid out by John Scarlett, has not been opened, and he believes is not intended to be opened; that the said road where it is intended to pass through deponent's land, in some places exceeds in width the road as hitherto travelled, and encroaches upon a yard, garden and outhouse of his, and covers the ground upon which his toll-house stands, under which there is space for a roadway of only 12 feet; that he never consented to the passing of the by-law; that he believes the object of the by-law is to force a public road through his land, and to deprive him of all power to collect

tolls for the use of a road which passes through his own property, and besides the by-law authorizes the encroachments on his yard, &c., above mentioned.

The rule was enlarged until Hilary Term, when *Bull*, for the Corporation of the Township of York, shewed cause. He cited Con. Stat. U. C. p. 614, cap. 54, sec. 319-23; *Lafferty v. Municipality Wentworth and Halton*, 8 Q. B. U. C. 232; *Grierson v. Provisional Council of Ontario*, 9 do. 623; *Standley v. Municipality of Vespra and Sunnidale*, 17 do. 69; *Ianson v. The Corporation of Reach*, 19 do. 591; *Re Taber and The Corporation of Scarboro'*, 20 do. 549; *Hawkins v. Municipal Council of Huron, Perth and Bruce*, 2 C. P. U. C. 72; *Hill v. Municipality of Tecumseth*, 6 do. 297; and contended that the affidavits he put in and read, showed that Mr. Scarlett, when opposing the by-law before it was passed, objected before the council, that it had not been properly advertised, and wanted proper recitals, and was in other respects informal, insufficient and deficient; that John Scarlett had intended it as a public road; that the by-law covered the same ground as the old road did, but made it of a uniform width; that the affidavits showed that it did not run through a yard or garden, or encroach upon any outhouse, yard or garden; that as regarded the damage, it was out of the question, for the by-law was attacked only on the ground of encroachment.

The affidavit of the Hon. Mr. Howland stated that John Scarlett, when owner of the road called the Scarlett road, agreed with him that it should be a public road, subject only to the payment of toll, excepting to persons going to his mill, for which Mr. Howland paid him eighty dollars, in repairing a bridge on the road.

The affidavit of the deputy reeve of the township stated that the by-law was passed on the petition of about eighty landholders in the vicinity; that John A. Scarlett was heard in person against the passing of the by-law; that he did not object to it on the ground on which he now puts it, but did not wish it to be passed; that John Scarlett, the applicant's father, who had originally laid out the road, and Edward Scarlett, his brother, sanctioned, advocated and urged the

passing of the by-law; that it was passed in good faith, and the road is intended to be opened as soon as Mr. Scarlett is settled with for the opening of the road. The affidavit of Samuel Scarlett stated that he was well acquainted with the Scarlett Road, and particularly with lots 7 and 8 in the 3rd concession of York; that the only house the road encroaches upon is about eight feet square and six feet high, which when new, would not cost over ten dollars; that it was a smoke-house, which had been moved from place to place; that he thinks it is 35 or 40 years old, and was last used as a hen-house; that at one time there was a garden near where this building now stands, but it has not been cultivated as such for upwards of five years, and is now a pasture field or common; that the toll-gate and frame has been erected since the survey of the road; that before the survey the road was of an irregular width, varying from 29 to 60 feet, but the greater part was about 35 feet wide; that he believes it was originally laid out by his father, John Scarlett, for the benefit of the public.

The affidavit of George Wilson stated, that he was tenant of John Archibald Scarlett, and resided on lots 7 and 8, in the 3rd con. of York; that he was overseer of highways for 1863, and did statute labor on that portion of the road, through these lots; that there is no yard or garden encroached upon; that there is no barn or outhouse except a small frame building, about seven feet square, which has not been occupied for any purpose for the last four or five years, not worth eight dollars, and can be moved from place to place, and except the frame of a toll-house, which has never been enclosed or occupied, and was built since the survey of the road, and as he believes, to prevent the establishment of the road; that the road, as originally laid out through lots 7 and 8 was about 60 feet, but has been reduced in width to 40 feet; that the establishment of the road will be a great public convenience, and benefit Mr. Scarlett himself.

The affidavit of Wm. Tyrrell stated that he is reeve of the township; that the toll-gate referred to was not begun or erected till the corporation had been petitioned to pass the by-law; that every one through whose land the road passes,

had signed the petition except Mr. J. A. Scarlett; that the by-law was passed in good faith, and the road is intended to be opened.

The affidavit of Mr. Gossage, a P. L. S., stated that when he and Mr. Dennis surveyed the road, there was no toll-gate on lots 7 and 8 in the 3rd con.; that there was then a travelled road of irregular width through these lots; that it was laid out so as not to interfere with any yard, garden, or outhouse; that the only house he found was a small frame building, about eight feet square and six feet high, which apparently at some time had been used as a hen-house; that it was very old and of no value; that he laid out the road with full knowledge of the building, considering it of no value; that there was no occupied garden then on the line of road across these lots; that there was a dwelling house standing on one side of said lots, very old and unoccupied, in front of which there was a piece of ground, which appeared as if it had at one time been used as a garden, but at that time had no appearance of a garden, and was not so occupied or cultivated; that in November last, after careful examination, and careful extension of the road to the width mentioned in the by-law, he found it would encroach on the frame building first mentioned (the hen-house), three feet six inches; that the other building (the house) above mentioned, stands six or seven rods from the road, is still unoccupied, and the ground in front of it to the road is a pasture field, and has been so used all summer; that the said portion of road does not run through or encroach upon any yard, garden, orchard or outhouse upon the said lot, except as aforesaid.

The affidavit of Edward C. Scarlett, among other things, stated, that he lives on the Scarlett road, in the township of Etobicoke, and is interested in the road; that he considered it would be an advantage to the now owners of his father's estate, for the benefit of which it was laid out, if it were made a public road.

The affidavit of Samuel Scarlett stated that he is the owner of lot 9, in the third concession; that he became the owner of the lot, and built a mill on it, on the express condition that the road, which he, his father and brother had laid

out, should be a public road; that he has no means of access conveniently to his mill except on this road, and that John A. Scarlett, his brother, also requires it, for he has two houses fronting upon it; that his father owned about 1000 acres, and laid out this road originally for the benefit of his estate; and he stated other circumstances not now material.

There were several other affidavits in support of the same state of facts.

R. A. Harrison, in reply, filed another affidavit of Mr. J. A. Scarlett, stating some things not material to the question as now before the court, but asserting, that for the last eight or ten years, with short intervals, the frame dwelling-house mentioned in Mr. Gossage's affidavit, has been occupied by his tenants, and the garden and yard adjoining, and the small frame building used as an outhouse, have been also used as appurtenant to the dwelling-house; that the small frame building, garden and yard, upon which the proposed road encroaches, were occupied during the year 1862 and part of 1863; that a new tenant has taken possession of it, and will require to use the garden, yard and outhouse; that the said road does encroach on his said garden, yard and outhouse, and that he never consented to it, but protested against it; that from his father's actions, when he owned the Scarlett road, he does not believe he intended it should be a public road; and that the eighty dollars spoken of by Mr. Howland was expended on that part of the road in Etobicoke, not on any part of it mentioned in the by-law; and he denies that some of the statements in the other affidavits are true. He cited *Hughes v. C. & H. Ry. Co.*, 8 Jur. N. S. 221; *S. C. 7 L. T. N. S.* 197; *Bunnell v. Tupper*, 10 Q. B. U. C. 414; *Bald v. Hagar*, 9 C. P. U. C. 382; and argued, the by-law ought to be quashed.

JOHN WILSON, J.—This by-law was passed on the 18th day of May, 1863, and before it was passed, the complainant was heard in person against it. It seems strange, that if the objections now set up, are urged in good faith, that they were not then mentioned by him. If they had been, it is probable

they might have been obviated at the time, by a slight curve in the line of road. From what we gather from the affidavits, he was unwilling to have the road made a public one, as an infringement on his rights generally, and on his right to erect a gate and levy toll in respect of that portion of it which was his. We cannot presume, the corporation passed this by-law on other than public grounds, and from all we see, we think it was passed solely on such grounds. For the laches of the complainant, we might well discharge this rule, for the authorities cited require that prompt action for redress should be taken, for matters especially not apparent in the by-law, but this complainant allowed two whole terms to elapse before he moved in the matter, and he allowed statute labour in the mean time to be expended on this very part of the road.

But, on all the facts shown, we think we ought not to make the rule absolute. Here was an open travelled road, of long standing, of undefined width, but in many places much wider than as now established, a road which the complainant himself had no desire to stop up; on the contrary, he wished it open, and intended to levy tolls on it. We doubt the *bona fides* of his opposition, on the grounds now taken, and we think it unreasonable that he should now say, that in defining the width of the road, which he himself expected the public to use for his benefit, it encroached upon his outhouse, yard and garden. If the opening of it had originated with this by-law, and it had been shown, in fact, that it did encroach upon what the statute prohibited, we should have felt bound to carry out its provisions; but we doubt if a building, long unused as this had been, and of the character it was, is an outhouse within the meaning of the act. We doubt, too, if the garden and yard, such as they are now described to be, are within the statutes so as to prevent the establishment of the road. The complainant has his remedy for compensation for all the substantial injury of which he can justly complain, and we think we shall be doing justice to the public, and no injustice to him, if we discharge this rule: and it will accordingly be discharged, without costs.

Per cur.—Rule discharged.

THE QUEEN V. BROAD.

Perjury—Indictment for—Variance of charge in the information and indictment—Quashing of for.

Where a prosecutor has been bound by recognizance to prosecute and give evidence against a person charged with perjury in the evidence given by him on the trial of a certain suit, and the grand jury have found an indictment against the defendant, the court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information.

On the first day of Hilary Term, *C. S. Patterson* moved for a *certiorari* to remove into this court the indictment for perjury found at the last court of Oyer and Terminer for the city of Toronto, against William Lawrence Broad, and also to remove into this court the preliminary information against the said Broad, and the recognizances to prosecute and to appear thereupon entered into. He put in, with his motion paper, a copy of the information and complaint of Joseph Lyle Tucker, taken on oath before Stephen M. Jarvis, Esquire, Alderman of the city of Toronto, on the 31st day of October, 1863, who, on his oath, said, that on the 16th of October, 1863, a cause was tried at the assizes for the united counties of York and Peel, before the Honorable Adam Wilson, in which Thomas Hooper was plaintiff and Wm. S. Christoe was defendant, and that on that trial Broad was called as a witness for the defendant Christoe, and then and there being sworn stated—

1st. That he, Broad, was present at the deponent's office when the deponent secured said Hooper with part of one Connell's farm.

2nd. That the said part of Connell's farm, fifty acres, was given to Hooper to secure him for the note sued on in that action.

3rd. That when the said land was given the deponent, said Connell, Hooper and Broad, were present; and Tucker swears, that the above three statements were material at the trial, and that they are false, and Broad committed wilful and corrupt perjury.

He put in also a copy of the information and complaint of Thomas Hooper, taken on oath before Mr. Jarvis on the same

day and occasion, stating the same facts, and charging the same perjury by Broad.

He put in also a copy of the recognizance of William Lawrence Broad, William S. Christoe, and Richard Allen, taken on the 17th of November, 1863, before George Boomer, Esq., P. M., reciting that Wm. Lawrence Broad had been on that day charged before the said George Boomer for that he, the said Wm. Lawrence Broad, did, on the 16th day of October, commit wilful and corrupt perjury in a case tried at the assizes for York and Peel, in the said city, in which Thomas Hooper was plaintiff and W. S. Christoe was defendant, and binding them that Broad should appear at the next court of Oyer and Terminer and general gaol delivery to be held at Toronto, in and for the County of the city of Toronto, and plead to such indictment as might be found against him by the grand jury, for and in respect of the charge aforesaid, and take his trial upon the same, &c.

He put in also a copy of the recognizance of Richard J. Wilkinson, Joseph L. Tucker, David Connell, Thomas Hooper, and Lewis Tourjé, taken before Mr. Boomer on the same day and occasion, binding them personally to appear, at the said next assizes, to prosecute and give evidence against William Lawrence Broad on a charge of perjury.

He put in also a copy of the indictment found by the grand jury against Broad at the court of Oyer and Terminer and general gaol delivery held in and for the county of the city of Toronto, in the month of January last, before *Hagarty, J.*, wherein Broad was charged with having committed wilful and corrupt perjury on the trial of the cause of Hooper against Christoe, before *Adam Wilson, J.*, in stating, that he Broad was present in the office of one Joseph Lyle Tucker on a certain occasion when one David Connell made and executed a deed of certain lands to the said Thomas Hooper, and that the said Thomas Hooper, the said Joseph Lyle Tucker, and the said David Connell were all present in the said office on that occasion, and that it was on that occasion agreed between the said Joseph Lyle Tucker, the said David Connell, and the said Thomas Hooper, that the said David Connell should execute the said deed of the said land

to the said Thomas Hooper, as payment by the said Joseph Lyle Tucker to the said Thomas Hooper to the amount of £500 upon the promissory note on which the said action was brought, and that the said deed was executed by the said David Connell in pursuance of the said agreement and as payment by the said Joseph L. Tucker to the said Thos. Hooper to the amount of £500 upon the said note, which facts were and each of them was material to the said issue; whereas in truth on the said occasion when the said David Connell made and executed the said deed, the said Thomas Hooper, the said Joseph Lyle Tucker and the said David Connell were not all present in the said office. The said Thomas Hooper not being present, and it was not on that occasion agreed in manner aforesaid, and no such agreement was ever made between the said Joseph Lyle Tucker, the said David Connell, and the said Thomas Hooper, and the said deed was not executed in pursuance of the said agreement, and as payment by the said Joseph Lyle Tucker to the said Thomas Hooper to the amount of £500 upon the said note, and the said William Lawrence Broad did thereby commit wilful and corrupt perjury.

J. WILSON, J.—The complaint before Mr. Boomer does not appear but from the recital in the recognizances; it is to be presumed, that on the 17th day of November, 1863, Broad was charged before him with having committed wilful and corrupt perjury on the trial of the case of *Hooper v. Christoe*, before the Hon. Mr. Justice A. Wilson at the previous assizes. Broad was bound over to answer such charge. The prosecutor and the witnesses were bound over to prosecute and give evidence upon it. The indictment assigns perjury on the trial of that cause. We see no reason for allowing the proceedings to be brought in, for the purpose of quashing the indictment, as varying from the charge which the defendant Broad was bound to answer. The information made before Mr. Jarvis on the 31st of October, has no necessary connexion with that before Mr. Boomer on the 17th of November, so far as the papers before us show. It may have been the information upon which the warrant issued to bring Broad up before him or any other justice of the peace, but it does not appear to

have been the information upon which the recognizances were based.

The Stat. 24 Vic., ch. 10, enacts that, no bill of indictment for perjury shall be presented to or found by any grand jury “unless the prosecutor or other person presenting such indictment had been bound by recognizance to prosecute or give evidence against the person accused of such offence.” Here we have such a recognizance as would warrant the indictment; or “unless the person accused has been bound by recognizance to appear and answer to an indictment to be preferred against him for such offence.” Here we find the person accused had been bound by recognizance to appear and answer to such an offence as is charged in the indictment.

The ground upon which the rule was sought for was, that if there was a variance in the specific perjury charged in the information, and the specific charge of perjury contained in the indictment, that the indictment ought to be quashed. At present this is not the case before us, but we think it would require a case stronger than the one suggested on the present occasion to induce us to put the strict interpretation on the statute which is now pressed upon us. If the indictment set forth the substantial charge contained in the information, so that the defendant had reasonable notice of what he had to answer, we should incline to think this a compliance with the statute, and would refuse to quash the indictment.

Per cur.—Rule refused.

IN RE. ROSS V. THE CORPORATION OF THE UNITED COUNTIES OF YORK AND PEEL.

Municipal by-law—Intoxicating liquors—Sale of—Con. Stat. U. C., ch. 54.

A section of a by-law passed by a municipality prohibiting the sale of intoxicating liquors on Sunday to all persons, without excepting the sale thereof to travellers and boarders, *held* invalid. A section of a by-law prohibiting the sale of intoxicating liquors to idiots and insane persons, *held* good.

J. Hallinan, in Michaelmas Term, obtained a rule calling upon the counties of York and Peel to shew cause why the second and fifth sections of the by-law, intituled “a by-law to

make provision for the preservation of the public morals within the united counties of York and Peel," or either of them, or such parts thereof as this court should deem illegal, should not be quashed with costs.

1st. Because the second section is contrary to law in making no provision or exception for the sale of liquors to travellers or boarders, according to the statute in that behalf, and

2nd. Because the fifth section attempts to enact an impossibility, for it does not define who is to be considered a child, nor does it provide for how an innkeeper may know an apprentice.

M. C. Cameron, Q. C., shewed cause this term.

The 2nd section is—"it shall not be lawful for any person to sell intoxicating liquors, or to allow or permit the sale of intoxicating liquors, or to use improper or profane language in any inn, tavern, grocery or house of public entertainment, or in any public street or highway or other place in the open air, on Sunday, within these counties."

The 5th section is—"it shall not be lawful to sell or give intoxicating drink of any sort to any child, apprentice, idiot or insane person, within these counties, without the consent of the parent or legal protector of such person or child, nor shall any person sell or give intoxicating liquors to any servant when notified either verbally or in writing by his employer to that effect."

Section 282, sub-section 2, supports the 5th section of this by-law, excepting as to idiots and insane persons, and the court will not hold the section bad on that account.

The statute enables by-laws to be passed "for [among other things] preventing the sale or gift of intoxicating drink to a child, apprentice or servant, without the consent of a parent, master or legal protector."

The 2nd section of the by-law is also sufficient under section 254 of the Municipal Act. In *re. Bright v. City of Toronto*, 12 C. P. U. C. 433.

Hallinan supported the rule.

ADAM WILSON, J.—Section 254 of the Municipal Act forbids the sale or disposal of intoxicating liquors to any person

from or after the hour of seven of the clock on Saturday night till the hour of eight of the clock on Monday morning thereafter, and during any further time on the said days, and any hours on other days during which by any by-law of the municipality all places for the sale of intoxicating liquors, or the bar rooms thereof, ought to be kept closed, "save and except to travellers lodging at, or ordinary boarders lodging at such places, and save and except in cases where a requisition for medicinal purposes, signed by a licensed medical practitioner or by a justice of the peace, is produced by the vendee or his agent." The by-law has adopted the general prohibitory provisions of the statute without adopting the exceptions to these provisions expressly enacted by the legislature. The by-law as it stands forbids the sale of intoxicating liquors to all persons on Sunday—the statute does not do so—it excepts travellers and boarders at those places where liquors may be sold, and persons requiring it for medicinal purposes. The by-law has force only by the statute. When the power exercised exceeds the power delegated, the exercise of that power is invalid. The cases of *Baker v. The Municipal Council of Paris*, 11 Q. B. U. C. 621 ; *Barclay v. The Municipal Council of Darlington*, 12 Q. B. U. C. 86, which were decided before the exceptions above stated were embodied in the present act, satisfactorily shew that this general and unqualified prohibition of the by-law cannot be maintained. It is of very little consequence that this part of the 2nd section of the by-law should be set aside, for the law as it stands by the 254 section fully provides for the cases which the by-law was legislating upon.

The 5th section of the by-law is, in our opinion, not invalid, because in addition to children, apprentices and servants, it also includes idiots and insane persons, to whom intoxicating liquors shall not be sold. In the case against the township of Darlington, the court determined that municipal corporations had no power to pass a by-law of this kind with respect to children and apprentices; but since then the legislature has expressly empowered municipal bodies to provide for cases of the kind, and although idiots and insane persons are not named in this part of the statute, it can scarcely be deemed an excess

of authority by the municipality when they have the power to restrict sales being made to apprentices and servants, who may be men of mature age, and in possession of their full faculties, that they should seek to protect a class of persons who have not the means of judging wisely for themselves. It would surely be a violation of the "public morals" of which these councils are made the guardians, if they were to permit any one to sell intoxicating drink to an idiot or insane person, and it would be a very great defect in the law if they could not restrain so mischievous an act, by those who know what they are doing, from being practised against those who do not know what they are doing.

The 416th section of the act permits any two justices of the peace to commit *idiots* to the house of industry or refuge. The general rule of law that a lunatic is liable on his contract for necessaries, and for other goods suitable to his rank which have been actually enjoyed by him, and which were supplied under circumstances which shewed that no advantage of his mental incapacity had been taken by the person contracting with him, would certainly maintain this by-law, if the words were that no person shall sell intoxicating drink to any idiot or insane person, "knowing him to be such;" but when the legislature has not required such words to be used in cases of infinitely greater difficulty for the vendor to discover, namely, whether the buyer is an apprentice or a servant, it can scarcely be said to be a hardship when the vendor is prohibited from dealing with an "idiot or insane person," whose condition is much more likely to be known to him from mere observation, than the fact of another being an apprentice or servant can possibly be, for no degree of observation by the vendor could inform him whether his purchaser was either an apprentice or a servant. But we have no doubt that both under the by-law and the statute no person could properly be convicted without alleging and proving the *scienter*.

The sale of intoxicating drinks has been placed, and wisely so, under stringent and special legislation in many respects, and as they are a subject of purchases which lunatics could probably not legally make at all, and as such persons are peculiarly deserving of the protection of the law on account

of their infirmity, we do not hold that the council has exceeded its powers in passing this purely protective by-law in their behalf.

The rule will be discharged as to the 5th section of the by-law, and it will be made absolute to quash so much of the 2nd section as relates to the restriction of the sale of innoxious liquors on Sunday ; that portion of it which forbids the use of improper or profane language will stand.

Per cur.—Rule accordingly.

LAUGHTENBOROUGH V. McLEAN.

*Assessment—Sale of lands for arrears of taxes.**

The north and the south half of a lot of land having been assessed separately and different amounts charged against each half lot, which amounts were afterwards added together and charged against the whole lot, and a portion of the whole lot having been sold for the combined amounts, being the respective arrearages of taxes due upon each half lot. *Held*, that such sale was illegal.

This was an action of ejectment to recover possession of the south-west quarter of lot No. 10, in the 8th concession of the township of Innisfil, to which the defendant appeared and defended for the whole of the land claimed.

The plaintiff claimed title as lessee of the Rev. Samuel B. Ardagh, rector of Barrie, and who, as such rector, is grantee of the Crown.

The defendant claimed title under a deed from Jas. Clement, who purchased the land at a sale of lands for taxes in the county of Simcoe, and obtained a deed from the sheriff in pursuance of such purchase.

The trial took place before *Morrison*, J., at Barrie, in March, 1863.

The plaintiff put in the patent, dated 21st January, 1836, granting, among other lands, the whole of No. 10 in the 8th concession of Innisfil, as a glebe and endowment to be held appurtenant with the parsonage or rectory, at the town of Barrie, and a lease from the rector to the plaintiff, dated the 2nd of April, 1856, of the south half of this lot No. 10, for the period of twenty-one years, rendering rent.

The defendant put in a deed from the sheriff of Simcoe to James Clement, dated the 26th of July, 1859, for the premises claimed, and a deed for the same land from Clement to the defendant.

The land was sold for taxes under a writ from the treasurer, dated the 23rd of February, 1858, designating the whole of lot No. 10, containing 200 acres, the taxes upon which were stated at \$72 02. The sale took place on the 13th of July, 1858.

The treasurer was examined as a witness, and by a memorandum put in by the parties it was admitted that the following should be received as his evidence :

Lot No. 10, in the 8th concession of Innisfil, was included in the warrant of the treasurer of the county of Simcoe to the sheriff of the same county, for the year 1858, for the sale of lands in arrear for taxes, with directions to sell this lot for £18 0s. 1d., the lot having fallen in arrear for that amount in the following manner, as appears by the books in the treasurer's office :

For the year 1853 the whole lot was assessed for £1 12s. 7½d., and was entered for that amount in the treasurer's books as a whole lot.

For the year 1854 the whole lot was assessed for £2 7s. 5d., and was entered for that amount in the treasurer's books as a whole lot.

For the year 1855 the lot was *assessed* as the north and south halves, at £1 8s. 4½d. for each half, and the treasurer appears to have coupled the two halves together thus :

North half, {	200	...£1 8s. 4½d.	} £2 16s. 9d.
South half, {		...£1 8s. 4½d.	

on the assessment roll, and to have still entered the lot as a whole one in his books.

For the year 1856 it was again *assessed* as two halves, north and south, but the treasurer entered it on his books as a whole lot, 200 acres.

For the year 1857 *the south half alone was assessed* on the non-resident roll, and the treasurer then divided the lot, in making the entry in his books, into the north and south halves, and charged against each half £8 2s. 6d., being one-

half of the whole tax, then against the whole lot ; and against the south half he placed in addition the sum of £1 15s. 1d., being the tax against that half for 1857.

In the year 1858 the whole lot was returned to the sheriff as in arrear for £18 0s. 1d., being the above amounts of £8 2s. 6d., £8 2s. 6d. and £1 15s. 1d., which include in them the interest at ten per cent. from year to year.

The sheriff advertised the lot as a whole lot, and sold fifty acres off the south half.

A lease of the north half of this lot for twenty-one years, from the rector to John Dickie, dated the 1st of December, 1852, was put in, and it was sworn that eight or nine years before the trial, Dickie lived on the lot under the lease ; that he raised a shanty on the lot, and lived there for four months or longer, and did some underbrushing, and lived a long while in the township, leaving about five years ago.

It was contended for the plaintiff that the offering the whole lot for sale for taxes partly due on the whole and partly due on the south half only, was illegal ; that, the taxes not being apportioned, the owners of each half would have to redeem the whole.

The learned judge directed a verdict for the plaintiff, with leave reserved to defendant to move to enter a verdict for him if the court should be of opinion that the warrant of the treasurer and the sale by the sheriff were valid.

In Easter Term, 26 Vic., *McMichael* obtained a rule *nisi* on the leave reserved.

McCarthy, for the plaintiff, shewed cause this term. The north and south halves should have been assessed separately for some years before 1857. In 1857 the south half was separately assessed, and therefore the sale of the whole lot for the separate arrearages on each half of it was unwarranted. The treasurer's duty was to keep different accounts with these half lots. He referred to Con. Stat. U.C. ch. 55, ss. 115, 124 ; Doe dem. Upper et al. v. Edwards, 5 Q. B. U.C. 594 ; Ridout v. Ketchum, 5 C. P. U. C. 50 ; McGill v. Langton, 9 Q. B. U. C. 91 ; Hall v. Hill, 22 Q. B. U. C. 578 ; Sibbald v. Roderick, 11 A. & El. 38 ; Clarke v. Woods, 2 Exch. 396.

McMichael supported the rule, contending that the sale was regular; it was warranted by the treasurer's books, which had never properly separated the half lots, but had returned the whole lot in one parcel for the purposes of taxation. *Peck v. Munro*, 4 C. P. U. C. 363.

ADAM WILSON, J.—It does not appear in what manner this land was assessed for the years 1852 to 1856 inclusively; whether in the name of *the owner*, under the 16th Vic. ch. 182, sec. 7, or in the name of any *occupant*, sec. 7, or in the names of the owner *and* occupant, sec. 7. It does not even appear very distinctly whether the land was assessed as “non-resident land” or not.

It may during these years have been assessed in the name of some person as owner or occupier; it was assessed for 1853 and 1854 as a whole lot, but for the years 1855 and 1856 the halves seem to have been separately assessed, although the treasurer, while he entered each half lot of 100 acres in his books as assessed for a separate sum, carried out the whole quantity of land at 200 acres, and for the total taxes, as if it were a single sum, and as a single rating or lot.

Whether there was any and what possession, and by whom during these four years, is not properly explained. It is said that John Dickie, who became the lessee under the Rev. Mr. Ardagh in December, 1852, lived on the north half for several months about the years 1854 or 1855, put up a shanty, and did some underbrushing, and continued to live in the township until about the year 1858. This may account for the division of the lot in halves in the years 1855, 1856 and 1857.

From such very imperfect information I will assume that in the years 1853 and 1854 the whole lot was assessed as a single lot, and properly so I will also assume; for although Dickie received a lease in December, 1852, he may not have entered on the land or have been known to the assessor during these years, and the assessor would therefore be fully justified in treating the lot as an entire lot; see secs. 7 and 8 of the act. I will also assume that in the years 1855, 1856 and 1857 the assessor for each year had such information or

knowledge as induced him to divide the lot into the north and south halves, as separate assessable properties, and that he did so divide it appears from the admissions of the parties. It may not, therefore, be very material whether in any or what name, or in what capacity it was entered by the assessor in his book in connexion with this lot, or with either half. The principal question is, what is the assessment, and by whom and when is it made? Is it the rating upon the assessment roll? or is it the entry upon the collector's roll? or is it the entry made by the treasurer in his books? The routine appears to be :—The assessor makes up his roll, assessing all lands and in the names of all persons as owners or occupiers, excepting in the case of non-residents, who do not desire their names to be entered. The assessor delivers this roll to the clerk of the municipality, who puts up a copy of it for public inspection. The clerk transmits a copy of this roll to the county clerk. The clerk of each municipality makes out a collector's roll for the township, &c., in which he sets down the name in full of each party assessed, and the correct assessed value of the real and personal property of each party; and he also makes out in a roll the lots, parts of lots, or parcels of land assessed against non-residents whose names have not been set down in the assessor's roll. The collector returns his roll to the treasurer of the township. The treasurer of each municipality furnishes the county treasurer with a copy of the collector's roll returned. The treasurer of the county after this receives all such arrears. The treasurer of the county enters under the heading of each municipality in his county all the lands therein on which it appears from the returns made to him by the clerk of the municipality, and from the collector's roll returned to him, that there are any taxes unpaid, and the amounts so due. And whenever a portion of the tax on any land has been in arrear for five years, the treasurer of the county issues his warrant to the sheriff to levy on the land for the arrears. The assessor, when he assesses any person, but before he completes his roll, is required to leave for every party named thereon a notice of the value at which his property has been assessed; and any person complaining of such assessment can apply for

relief to the court of revision. The party assessed may also have inspection of his assessment from the copy put up by the clerk before the court sits. When the revision is concluded, "the roll is finally revised and corrected," and it is declared to be "valid, and to bind all parties concerned."

The collector's roll contains some of the particulars of the assessment roll, copied from that roll. No one knows anything of what actually goes into this roll, although he knows that nothing ought to go there but what is upon the assessment roll. The collector's roll is made, not for the purpose of creating a charge, but for the purpose of collecting a charge already made by the assessment roll.

In like manner, when this roll is returned to the township treasurer, and a copy by him sent to the county treasurer, and an entry made by him in his books, no charge is created; the arrears are merely recorded for final collection.

It appears to me, therefore, that the "assessment" is the rating which is made upon the assessment roll by the assessor, and that it is completed when the roll is finally passed. If this be so, then it follows that the entry as made upon that roll is the assessment which is to govern, and that all the other copies and entries ought to correspond with the primary roll, and are only copies of and entries from it.

As the *assessments* for 1855, 1856 and 1857 were made against these half lots, and as the treasurer's books are not against the assessments in this particular, they should be read so as to correspond with the assessment rolls, if it be possible so to read them, and so I think they may be read.

From these considerations it appears that the assessments of 1855 to 1857, being made against the half lots only, do not authorize the charges of the two to be combined against the whole lot—and a portion of the whole lot to be sold for the separate arrearages due upon each half of it.

The decisions of our courts before referred to shew how the law must be upon these facts; that the sale of the portion of the whole is not the part that would have been sold upon a sale of a portion off each of the halves that were charged, and that each part has been thus charged with twice as much as it ought to have been; and that as such sales are really a

forfeiture of the freehold, they must be conducted with the utmost regularity.

It is no answer to say that the treasurer might, on being satisfied that any parcel of land had been sub-divided, have received the proportionate amount of the tax charged upon the whole, for this is not a case where the whole has been charged, but where the sub-divisions have been charged, and the whole is attempted to be made responsible for it.

The provision referred to is when the assessor, according to the best information in his power, has assessed and returned a whole lot which should really be in parcels, and which may be strictly liable to be treated thenceforward as a whole lot if the parties affected do not correct it by appeal, or have it corrected by the treasurer. It has no application to this case, which is just the converse of the one referred to.

As no question was raised before us as to the liability or nonliability of this land, being part of a rectory appropriation, to be sold absolutely for taxes, we express no opinion upon it, and from the conclusion at which we have arrived it is not necessary we should do so.

The *postea* will therefore be delivered to the plaintiff.

Per cur.—Rule discharged.

RUTHVEN V. STINSON.

Trespass—Distress—11 Geo. II., ch. 19, sec. 2—Withdrawal of count from consideration of jury—Misdirection.

The 5th count of the declaration was in trespass for seizing, &c., defendant's goods, and disposing of the same. The 6th count was for illegal distress. To the 5th count defendant pleaded not guilty, that the goods were not plaintiffs, and that he seized and sold them to satisfy arrears of rent, and to the 6th count the general issue by statute, referring to 11 Geo. II., ch. 19, sec. 2. At the trial the only evidence given by plaintiff went to shew the seizure and sale referred to was for a distress for rent. The defendant's counsel contended that as only one seizure had been made the plaintiff should be compelled to elect on which count of the two above referred to he would go to the jury. The learned judge who tried the cause refused to compel plaintiff to elect, but said he would direct the jury that the evidence given applied more to the 6th count than the 5th; after which the plaintiff's counsel addressed the jury, and stated that he withdrew the said 6th count from their consideration. The judge charged the jury that the evidence given applied to the 6th count, and that they should find for the defendant on the 5th count, charging them as if both counts were before them for their consideration.

The jury found a verdict for plaintiff on the 6th count for \$100, and a verdict for defendant on the 5th. On motion to set aside the verdict by each party respectively, on the finding on each count, for misdirection, *held*, 1st. That the plaintiff could not withdraw a particular count or issue from the consideration of the jury without the consent of the defendant, so as to prevent them giving a verdict on such count, and the jury in this case should have been directed to find for the defendant on the 6th count, and the case left to them on the evidence on the 5th count. But as substantial justice was done by the finding, a rule for a new trial was refused on that ground, but granted to defendant as he might have been misled by the ruling of the judge.

Plaintiff issued his writ on the 25th of September, 1863.

The first four counts of the declaration were for slander. The fifth count for seizing the plaintiff's goods, household furniture, and shop fittings, (naming the articles,) and carrying away the same, and disposing thereof to his own use, whereby plaintiff lost the goods and was greatly damnified in his business of a commission merchant, in which said business, and as necessary therefor, certain articles seized were used.

The sixth count alleged that plaintiff was defendant's tenant of a certain shop, at a certain rent, payable to the defendant, and the defendant wrongfully distrained, for arrears of the rent, goods of the plaintiff of much greater value than the amount of the said arrears and of the charges of the said distress, and of the appraisement and sale thereof, although part of the said goods was of sufficient value to have satisfied the said arrears and charges, and might then have been distrained by the said defendant for the same, and defendant thereby made an excessive and unreasonable distress for the said arrears contrary to the statute.

There were various pleas to the first four counts on which no question arose. To the fifth count defendant pleaded, 1st. Not guilty. 2nd. The goods and chattels not plaintiffs. 3rd. That he seized the goods to satisfy \$68 75, three months arrears of rent due from defendant to plaintiff of certain premises demised by defendant to him, and after keeping them five days he appraised and sold them to satisfy the arrears of rent.

As to the 6th count he pleaded general issue by statute 11 Geo. II., cap. 19, sec. 21.

The cause was taken down to trial at the fall assizes of 1863 for the county of the city of Toronto, held before Mr.

Justice Adam Wilson, when a verdict was rendered for the plaintiff on the 1st count for \$400 damages; on the second and third counts with damages, \$1 on each count, and on the sixth count for \$100, and for the defendant on the fourth and fifth counts.

One of plaintiff's witnesses proved that in September last plaintiff's property was sold at a bailiff's sale on his premises. Defendant was then urging the sale on. The bailiff would not interfere to remove some show cases that were nailed down to the floor until defendant ordered him to wrench them off, which the bailiff then did. The show cases were taken away as also some household furniture, stoves, &c.; defendant seemed very anxious to have the things sold and removed.

Another witness, plaintiff's brother, proved the property was seized before the 24th of September. He calculated the value of the things sold at \$300. Defendant was present at the day of sale and bought the principal part of the things sold; he claimed \$68 rent. They were sold on the premises; a flag out and a notice of bailiff's sale stuck on the door.

On cross-examination he said his brother had been in the premises since May, 1862, and had not paid any rent to that time; that there were not many persons at the sale, which was for a quarter's rent.

J. H. Cameron, Q. C., for defendant, contended that as only one seizure had been proved, plaintiff should be compelled to elect whether he would rely on the 5th or 6th counts. The judge declined to compel the plaintiff to elect.

The defendant's counsel then desired to know on which count the learned judge would rule the evidence applied. He replied the sixth, although if the fifth stood alone it would apply on it; that in fact it applied on both as they then stood, though the recovery could only be upon one, and in his opinion that one was the sixth; and if the case stood when he summed up as it did then, he should so direct the jury. On this the defendant decided not to call any witnesses. The plaintiff's counsel said he would not elect, and if the defendant went to the jury without calling witnesses, he might then, if he pleased, abandon the sixth count and go to the jury on the *fifth*. The learned judge doubted if he could do this after his refusal to elect upon which count he

would go, when he had only one cause of action in respect of the seizure, and the defendant, in consequence of the opinion of the court, called no witnesses, and the plaintiff had concluded the defendant in that way.

J. H. Cameron, Q. C., for defendant, contended the sixth count was not fully proved, and if no other evidence appeared plaintiff must fail on it; but plaintiff would not withdraw it because he contended he might be able to prove it if the defendant went into evidence.

The learned judge ruled that though the count might not be entirely proved, yet the evidence might more properly apply to such one count than the other.

The plaintiff's counsel then addressed the jury, and declared that he withdrew the sixth count from their consideration.

The learned judge charged the jury that the evidence, as to the taking, applied to the 6th count, and not to the fifth, and to find for the defendant as to the fifth count. He directed them in the same way as if both counts were before them, and not withdrawn. Plaintiff's counsel objected to this, and contended he should direct the jury what a trespass was. This the judge declined to do, as in his view the jury had nothing to decide upon respecting the fifth count. The jury consented to enter a verdict for defendant on the sixth count, subject to the opinion of the court.

In Michaelmas Term last *M. C. Cameron*, Q. C., obtained a rule for the plaintiff, calling on the defendant to shew cause why the verdict should not be set aside and a new trial had between the parties, the verdict on the 5th count of the declaration being contrary to law and evidence, and for misdirection of the learned judge who tried the cause, in telling the jury that the evidence given by the plaintiff of the seizure of his goods by the defendant was applicable to the 6th count, and not to the fifth, and that there was no evidence for the jury on the fifth count, and that the plaintiff could not abandon his sixth count.

During the same term *J. H. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict entered for the plaintiff for \$100 on the sixth count should not

be struck out on leave reserved, on the ground that that count was not before the jury at the trial, the plaintiff having expressly withdrawn the same from their consideration, and abandoned all claim to recover thereon in his closing address to the jury, and before the address to the jury by the defendant's counsel, and that the learned judge should have refused to record the verdict, or why there should not be a new trial without costs, on the ground that there was not sufficient evidence to sustain a verdict for the plaintiff on the sixth count, and that the plaintiff expressly abandoned the same at the trial.

Both rules came on to be argued during the term by *M. C. Cameron*, Q. C., for plaintiff, and *J. H. Cameron*, Q. C., for defendant. The following cases were cited for the plaintiff: *Drew v. Avery*, 13 M. & W. 399; *Knight v. McDouall*, 12 A. & E. 438.

RICHARDS, C. J.—I have looked at most of the cases bearing on the subject and am of opinion that a plaintiff cannot, without leave of the court, at the close of his case withdraw a particular count or issue from the consideration of the jury if objected to by the defendant. If a general verdict is given for a plaintiff against the defendant's consent, when on some of the counts the verdict ought to have been for the defendant, it will be a good ground for a motion for a new trial. When a *nolle prosequi* is entered to a portion of the plaintiff's demand before trial, it seems the effect is to withdraw that part of plaintiff's claim from the consideration of the jury; and when a *nolle prosequi* is entered as to one count it does not preclude the plaintiff from proceeding at the trial upon another count, which, although apparently for a different cause of action, is in reality founded on the demand which might have been recovered upon the count which the plaintiff abandoned. As, however, there was no *nolle prosequi* in this case, and the plaintiff in his address to the jury only withdrew the sixth count from their consideration, I think the proper course would have been to have directed the jury to find for the defendant as to the issues on that count and to have left the case to the jury on the evidence as to the fifth count.

There are cases under the old practice where the jury were discharged from giving their verdict on immaterial issues, or such as so appeared at the trial; but since the costs of the issues are now taxed to the party who may succeed on each issue, I apprehend that the finding on the several issues cannot be dispensed with unless by consent of parties or the direction of the court.

The evidence, as to the taking of the goods, pointed to a distress for rent, and the seizing of a larger amount of property than was necessary to cover the amount claimed as rent. Although the terms of the tenancy were not shewn, nor an actual demise, yet there can be little doubt from the evidence that the plaintiff was the tenant of the defendant, and that the true ground of complaint against the defendant, if the plaintiff had really any ground at all in relation to the seizing of the goods, was for an excessive distress. If the plaintiff's claim as to the taking of the goods is to be considered in this light, it seems to me substantial justice has been done between the parties by the verdict on the sixth count.

I do not think the plaintiff's counsel could have been compelled to elect on which count of the declaration he would go in relation to the trespass. If both had been before the jury the presiding judge might have directed them to find on one or the other, as the facts shewn at the trial satisfied them that the plaintiff had made out his case. If he had told them that the facts and circumstances of the case seemed to indicate that the plaintiff was a tenant of the defendant, and that it appeared more as if plaintiff's true ground of complaint was for an excessive distress than for a trespass, and had left it to the jury to find for the plaintiff on either count, and they had found according to the present verdict, I doubt if we would have set aside the verdict. If he had directed a verdict for the defendant on the sixth count, and then left it to the jury in precisely the same way as I have just suggested he might have done if both counts had been before them, merely saying however, if the facts satisfied them that the defendant had been guilty of the excessive distress, and not of the trespass, then to find for defendant as to both counts; as to the fifth because they were satisfied that the defendant

had seized the goods for rent and was not guilty of the trespass, and as to the *sixth* because the plaintiff had abandoned it, and if the jury had found for the defendant on both these counts, in that view, I am by no means certain that we should have set aside the verdict.

But here the jury have found for the plaintiff on the sixth count perhaps on insufficient evidence, but nevertheless they have found for the plaintiff under the direction of the learned judge. In relation to his claim against the defendant for taking his goods, we are asked to set aside the verdict because the judge erred in not directing the jury that they might find for the plaintiff on the other count instead of this. If we allow the verdict to stand as far as the plaintiff is concerned, he will have recovered substantial damages for what appears to be the real injury that he has suffered. If we grant a new trial we throw open again the question as to the slander, on which the plaintiff has recovered some four hundred dollars, and the whole case will be tried over again, because the plaintiff may possibly increase his damages for the seizure of his goods, as to which we have no reasonable doubt but that they were seized for arrears of rent, and in relation to which the jury have pronounced their verdict on the real facts of the case.

I think we should not grant a new trial unless we are compelled to do so.

It is a very well established rule, that every mistake of a judge in charging a jury, either as to the law or facts of a case, or as to the mode of conducting it, does not entitle the party complaining of such mistake to a new trial. If the judge allows a party to call a witness after he has closed his case, contrary to the usual practice, or allows the wrong party to begin, or misdirects the jury on an immaterial point, or allows some evidence to be admitted which is not strictly regular; in these, and the like instances, the court will not grant a new trial unless they are satisfied the result of the case has been influenced by the irregularity, or that injustice has been done by it.

In *Moore v. Tuckwell*, 1 C. B. 607, *Tindal*, C. J., says: "It is not the practice, as stated at the bar, that in all cases where there has been a misdirection, a new trial must be

granted *de jure*, because a bill of exceptions might have been tendered; for where the court can see clearly that real and substantial justice has been done, or may be done without a new trial, the rule has been refused." There is abundance of authority that when a bill of exceptions cannot be tendered for the misdirection complained of, a new trial cannot be claimed as a matter of right.

On the whole, though not free from doubt, I think the plaintiff's rule for a new trial in this cause ought to be discharged, as it seems that substantial justice has been done between the parties in the matter complained of.

As to the defendant's rule we do not feel justified in making it absolute to set aside the verdict on the sixth count, as long as the verdict stands for him on the fifth. If he desires it however, as he may have refrained from calling witnesses in consequence of the ruling of the learned judge, he may have a new trial on the whole record without costs.

Per cur.—The defendant electing to take a new trial—rule absolute for new trial without costs.

See *Brown v. Bristol & Exeter Railway*, 4 L. T. N. S. 830; *Powell v. Sonnett*, 3 Bing. 381; *Hall v. Ashurst*, 3 Tyr. 420; *Cossey v. Diggon*, 2 B. & Ald. 546; *Ward v. Bell*, 1 C. & M. 848; S. C., 3 Tyr. 904; *Devie v. Ivey*, 4 Q. B. 379; *Jackson v. Galloway*, 2 D. & L. 839; *Holford v. Dunnett*, 7 M. & W. 348; *Lee v. Muggeridge*, 5 Taunt. 36; *Ferguson v. Clarke*, 2 Starkie, 442; *Compere v. Hicks*, 7 T. R. 727; *Taylor v. Cole*, 3 T. R. 296.

MILLER (DEFENDANT) APPELLANT V. KINSLEY (PLAINTIFF)
RESPONDENT.

Lease—Covenant to repair—Breach of—Damages.

The declaration alleged that the defendant, by lease dated the 1st of October, 1862, did let to the plaintiff certain premises for the term of five years, and that it was mutually agreed between them that the plaintiff should and would well and sufficiently repair and keep repaired the erections, buildings, gates and fences erected or to be erected on the said premises, and that the defendant would find or allow to the plaintiff one half of the cost or expense of repairing the house or tavern, and should and would pay to the plaintiff the whole of the costs and expenses of repairing and erecting the fences and gates erected, or to be erected on the said premises, the said repairs and erections to be paid for by the defendant at the end of the first

year of the said term. It then averred that the plaintiff did, within the first year of the said term, duly repair the said house and duly repaired the said fences and gates, &c., and that the said repairs were valued according to the said lease, and demand made upon the defendant after the expiration of the first year of the lease, for payment of one-half of the costs and expenses of repairing the house and also for the whole of the costs and expense of repairs to and erections of fences and gates on the premises, and alleged a refusal to allow to the plaintiff the amount due him under the agreement out of the rent in accordance with the terms of the lease.

The defendant pleaded that the covenant to repair in the said lease was as follows:—"And the said lessee, meaning the plaintiff, doth hereby for himself, &c., &c., covenant to and with the said lessor, meaning the defendant, in manner following * * * that he, the said lessee, his executors, administrators or assigns, some or one of them, shall and will, at the costs and charges of the said lessee, well and sufficiently repair and keep repaired the erections and buildings, fences and gates erected or to be erected upon the said premises, and the said lessor finding or allowing one-half of the expenses of repairing the house. * * * The lessee to repair fences, the amount to be valued and to be paid by the lessor at the end of the first year of the term, the rails to be taken off the premises if possible."

To this the plaintiff demurred, and replied that the meaning of the lease was that both the repairs to the house and repairs to the fence were to be paid for by the lessor by the said lease. To this the defendant demurred. Judgment having been given in the plaintiff's favour in the court below, upon appeal

Held, that on the pleadings, as set out, the defendant was bound to pay half the repairs of the house and all repairs of the gates and fences, and the plaintiff was entitled to judgment. The appeal was therefore dismissed.

Quære—As to the mode in which the effect of a written instrument is to be brought before the court for their decision.

Appeal from the County Court of the united counties of Frontenac, Lennox and Addington.

The declaration alleged that the defendant, by his lease in writing, under seal, on the 1st day of October, 1862, did demise and lease unto the plaintiff, all that certain parcel or tract of land situate in the township of Pittsburgh, being the broken front of lot No. 24, in the 1st, otherwise called the 3rd concession of the said township, together with the tavern and improvements; to hold the same for the term of five years, from the said first day of October, 1862. And it was mutually covenanted and agreed by and between the plaintiff and the defendant each with the other, amongst other things, by the said lease, that the plaintiff should and would, at his own costs and charges, well and sufficiently repair, and keep repaired, the erections, buildings, fences and gates, erected or to be erected on the said premises; and that the defendant would find or allow to the plaintiff one-half of the cost or expense of repairing the house or tavern, and should and would pay to the plaintiff the whole of the costs and

expense of repairing and erecting the fences and gates erected or to be erected on the said premises; the said repairs and erections to be paid for by the said defendant at the end of the first year of the said term, after valuation of the same; and the rails required for the said repairs to and erections of the said fences and gates, to be prepared from timber growing on the premises, if possible. And the plaintiff averred that he did, within the first year of the said term, duly repair the said house, *and duly repaired the said fences and gates*, and put himself to great cost and trouble in procuring rails from a distance to repair and erect necessary fences and gates on the said premises, as it was impossible to obtain them on the premises according to the said lease; and that the said repairs were valued according to the lease, and demand made upon the defendant, after the expiration of the first year of the term, for payment of one-half of the costs and expenses of repairing the said house, or to have the same allowed on the rent payable by the plaintiff to the defendant, in respect of the said premises; and also, for the whole of the costs and expense of repairs *to and erections of fences and gates* on the premises, so made by the plaintiff as aforesaid, according to the said lease. And the plaintiff further says, that all conditions were performed and fulfilled, and all things happened and were done, and all times elapsed to entitle the plaintiff to a performance of the said covenant and agreement; yet the defendant has committed a breach of the same, and *refuses to allow or pay to the plaintiff* the sum of money due by him in respect of such repairs. And the plaintiff claims two hundred dollars.

To this the defendant pleaded, as to so much of the declaration as relates to the repairing of the house or tavern, that in and by the said lease it was covenanted and agreed by and between the plaintiff and the defendant, in the words following and not otherwise, as to the repairing of the said house or tavern, “and the said lessee [meaning the plaintiff] doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said lessor, [meaning the defendant] his heirs and assigns, in manner following, that is to say: * * * that he, the said lessee, his executors, administrators and assigns,

some or one of them shall and will, at the costs and charges of the said lessee, well and sufficiently repair, and keep repaired, the erections and buildings, *fences and gates*, erected or to be erected upon the said premises; and the said lessor finding or allowing one-half of the expenses of repairing the house. * * * *The lessee to repair the fences*; the amount to be valued, and to be paid by the lessor at the end of the first year of the term. The rails to be taken off the premises, if possible."

And for a second plea the defendant, as to the residue of the declaration, says: That in and by the said lease it was covenanted and agreed by and between the plaintiff and the defendant as in the first plea alleged, and not otherwise, as to the residue of the declaration.

To this the plaintiff demurred, alleging that the pleas of the defendant to the above declaration were bad in substance.

The grounds of demurrer assigned were, that the said pleas put in issue matter altogether immaterial, and not properly issuable, and did not deny, confess or avoid, the substantial matter in the declaration. That the averment in the declaration as to the valuation of repairs to the house having been valued, or that they were to be valued, was mere surplusage, and as such, not properly traversable by the defendant. That the said pleas tender an immaterial issue, and were otherwise bad as amounting to the general issue.

At the trial the plaintiff was allowed to withdraw his traverse of the pleas and to reply as follows. And for a replication to the defendant's pleas the plaintiff says that the meaning of the said lease is that both the repairs to the house and the repairs to the farm were to be valued by the said lease.

The defendant says that the replication of the plaintiff to the pleas of the defendant is bad in substance. The grounds of demurrer were:

1st. That the replication tenders an immaterial issue, and an issue in a question of law.

2nd. And mutates the meaning of the lease as set forth in the plea.

Judgment on the demurrer having been given in favour of the plaintiff in the court below, the defendant appealed therefrom, so far as the same related to the second plea, on

the following grounds: that the said second plea was a good answer in law to that part of the plaintiff's cause of action to which it was pleaded, and that none of the objections taken to the said plea by the plaintiff, nor the grounds on which it was held bad by the learned judge, as set forth in his judgment, are entitled to prevail, and that the defendant should have judgment on the demurrer to the pleas, so far as said demurrer relates to the second plea or to that part of the said second plea which answers the plaintiff's claim for the cost of the erection of fences and gates and the cost of repairing gates.

The defendant also contended that the plaintiff's amended replication is of itself bad for the reasons assigned in the margin of the demurrer to said replication, and that the defendant should have judgment on the demurrer to the said replication, or to so much thereof as related to the second plea, or such part of said plea as this court should hold to be good.

The case was argued by *S. Richards*, Q. C., for the appellant, and *D. B. Read*, Q. C., for the respondent.

RICHARDS, C. J.—This case shews some of the inconveniences of the new rules of pleading as to setting out the instrument. If the defendant makes what he sets out of an instrument a part of his plea, as undoubtedly is the case now according to (*Sim v. Edmands*, 15 C. B. 240,) he will generally insert as little as possible and the court will be obliged to interpret the instrument from such portion of it as the defendant may choose to set out, and if this is the proper way, as defendant's counsel contended before us of obtaining the opinion of the court as to the legal effect of the instrument, it will be productive of great practical inconvenience. The plaintiff puts his interpretation on the agreement and sets it out according to its legal effect. The defendant, instead of pleading *non est factum*, and in that way bringing the whole instrument first before the jury and then before the court, and getting a decision as to its legal effect, says, as to the part on which the breaches are assigned, the covenant was in the words following, and then sets out the words. He then asks the court to say if the covenant and breach in the

declaration can arise from the words he sets out. The case of *Smith v. Scott*, 6 C. B. N. S. 771, referred to by *Read*, Q.C., on the argument, seems to place the question on the proper basis.

Williams, J., "says, the proper mode of taking advantage of a variance between the alleged and the real effect of a deed is by a plea of *non est factum*." *Willis*, J., said, "a party who executes a deed is estopped from denying that which the deed, upon the face of it, expresses. If he wishes to allege that the deed is not truly set out in the declaration, he must deny that it is his deed. If he admits that it is his deed he cannot deny the effect of it. For this there is abundant authority." Until there is some express decision to sustain it, we think we ought not to encourage this novel mode of obtaining the opinion of the court as to the legal effect of an instrument set out in a declaration, particularly after the opinions expressed by the Court of Common Pleas in the case referred to in 6 C. B. N. S. But taking the view of the case set up by defendant himself, I think, as to the second plea, he must fail, the first plea having been given up. The effect of the declaration and pleas as to this second plea, I understand, is as follows: plaintiff avers that he did duly repair the said house *and duly repaired the said fences and gates*, and that said repairs were valued according to the lease and demand made, according to the lease, on defendant for payment of one-half of the costs and expenses of repairing the said house, or to have the same allowed on the rent, and also for the whole of the cost and *expense of repairs* to and *erection of fences and gates* on the premises so made by plaintiff as aforesaid, according to the lease, yet defendant refuses to allow or pay to plaintiff the sum of money due by him in respect of *such repairs*.

The covenant, as set out in the plea, is that the lessee (plaintiff) will, at his cost, well and sufficiently repair, and keep repaired, the erections and buildings, fences and gates erected, or to be erected on the premises, the lessor (defendant) finding or allowing one-half of the expense of repairing the house * * * the lessee to repair the fences, the amount to be valued and to be paid by the lessor (defendant) at the end of the first year of the lease; the rails to be taken off the premises if possible.

The defendant contends that he is not, by the agreement, bound to pay for the repairs to the fences at all, or if the court is against him on that, then he is not bound to pay for the repair of the *gates*. The agreement, as set out, would seem to favour the opposite interpretation as contended for by plaintiff. The paragraph about the finding or allowing half the expense of repairing the house seems conclusive, and by the insertion of the * * * we may assume some other provisions were made as to other matters; then comes the new paragraph, the lessee to repair the fences, the amount to be valued and paid by the lessor, then the further provision evidently for the defendant's benefit, "the rails to be taken off the premises if possible." From the few words set out by the defendant we come to the conclusion he was to pay half of the expenses of the house, and the whole expense of repairing the fences. Though the allegations as to what he did, made by the plaintiff in the declaration, are broader than was necessary, and though he may have demanded more than he was entitled to for the expenses of the erection of gates, yet the breach assigned is for non-payment of money for the repairs of fences and *gates*, so that the whole ground of the defendant's appeal in this narrowed view of his case, is, that he is not bound to pay for the repair of *gates*. I think from the way in which fences and gates are joined together and mentioned in the former part of the covenant, we may assume the reference to repairing the fences in the part now under discussion meant *gates* also; gates usually forming a part of the fences of premises.

Per cur.—Appeal dismissed with costs, and judgment of court below affirmed.

PALMER ET AL V. HOLMES ET AL.

Contract—Special plea—Common counts.

The plaintiffs sued on the common counts for \$2,062 02, an amount of money in the hands of defendants, advanced by plaintiffs to them on account of oil furnished by the defendants to the plaintiffs, to be shipped to Liverpool and sold. The defendants pleaded never indebted, and the facts as set out in the special pleas in the statement of case.

The learned judge left the evidence to the jury, as to whether it sustained the defendants plea or not. The jury found for the plaintiffs. Upon motion for

a new trial, the court being of opinion that the special plea of the defendants was not sustained by the evidence, the plaintiffs were entitled to recover on the common counts, and that there was no misdirection, the rule for a new trial was refused.

This was an action on the common counts, to recover \$2,062 02, a balance in the hands of the defendants of money advanced to them on account of oil furnished to plaintiffs by defendants, to be shipped to Liverpool and sold there.

1st. plea, never indebted.

2nd. plea, special. That it was agreed between plaintiffs and defendants, that in consideration that the defendants would deliver from time to time to the agent of the plaintiffs (one Younghusband) at Wyoming, all the oil that might be manufactured by the defendants at their oil refinery during the fall and winter of 1863, the plaintiffs would make cash advances on account thereof, sufficient at least to cover the manufacturers cost, which advances were not to be repaid by the defendants, unless while the plaintiffs performed all things on their part, the defendants made default, and that to secure the highest price the plaintiffs would ship the oil regularly from Portland to Britain for sale, once a month during the said time, and in case of any decline in the British market, they would hold the oil for six months or longer till a rise in the market should take place; and the defendants averred that they had, during October, November, and December, in that year, and in January following, delivered to the plaintiffs' agent, at Wyoming, on the said terms, and not otherwise, all the oil made by the defendants at their refinery, according to their agreement, amounting to 464 barrels, and in all things performed the agreement on their part. That the plaintiffs, during the delivery of the oil, made cash advances to the defendants on account thereof as agreed on, which is the cash, in part, now sought to be recovered; that the oil delivered was sufficient in value to realize in the British market all the moneys so advanced, over and above all expenses, if the plaintiffs had monthly forwarded the oil to Britain and there sold it during the winter, according to their agreement, as they might and should have done; but that the plaintiffs, contrary to their agreement, did not ship the oil from time to time once a month, but wrongfully allowed the oil to remain in Portland

four months, and until oil in Britain had greatly fallen and the winter prices could no longer be got for it; that the defendants had requested the plaintiffs to sell the oil in the Canadian and American markets, and not ship it, but that the plaintiffs had refused, and afterwards shipped it to Britain; that the defendants had requested the plaintiffs to hold the oil over for six months till the fall of 1863, when the oil would again rise in price in Britain, but the plaintiffs refused, and, contrary to their agreement, sold the oil when there was a dull demand and for a less price than they would otherwise have got for it, and that they sold it for 1s. 8d. a gallon only, and retained the money to their own use, whereby, and by the improper conduct of the plaintiffs, they failed to realize sufficient to repay their advances.

3rd Plea. The defendants satisfied and discharged plaintiffs claim by delivering oil which they accepted.

4th Plea, set off. On all which, issue was joined.

The cause was tried before the *Chief Justice* of Upper Canada at Guelph, in November, 1863.

The plaintiffs witness was Younghusband, their agent. He said that the plaintiffs had become responsible to accept the drafts of the defendants who drew, and received \$5487 45, but had repaid \$3425 43 by a shipment of 468 barrels of refined oil, sent to plaintiffs in Liverpool. The returns had been submitted to defendants in his presence; that he had kept an account of the moneys received by the defendants, and they agreed in the amount; that on the sales being submitted to the defendants, Mr. Holmes, one of the defendants, said part of the loss arose from the leakage of 186 barrels, which he said he would pay, but required a month to consider whether he would pay the balance; that the price of oil had fallen in England in the beginning of the year, and the witness told the defendants that there would be a loss on the oil shipped if it was sold in the then state of the market, and that the plaintiffs would not hold the oil unless there were further shipments. The defendants proposed to ship 200 barrels; they were to have a nominal advance of \$3 per barrel instead of \$10, which they had previously received. They declined to ship more than 100 barrels, on which they took an advance of \$3 per barrel, and he raised the freight to send

them to England. They did not send the 100 barrels to England. Mr. Holmes, one of the defendants, said, they had concluded not to ship any more, but would refund the \$300 advanced on account of the 100 barrels, and they did so, leaving the original transaction as it was.

On his cross-examination he said the defendants first called on him in September 1862, proposing to ship. He shewed them an account of sales, and that plaintiffs had great facilities and were able to make advances and to hold over if the price fell. In November, 1862, he received at Wyoming 118 barrels, and six car loads, 348 barrels, from the 29th of January to the 4th or 5th of February, 1863. Defendants were to have such an advance as the state of the markets would allow. They were not to get an advance equal to the cost of the oil; he never said so to Erastus Smith, Robert Chalmers or John Allen; he did tell them the prices in the English market from time to time as furnished to him, but not that 2s. 3d. per gallon could certainly be realized; he made no arrangement that the oil was to be shipped monthly, but he did say that if the oil furnished amounted to a cargo monthly, it would be shipped. The first draft was for £300 sterling; \$960 was, on the 20th of November, paid to defendants. The next was on the 11th of December, amount £100 sterling; \$484 was paid to defendants. The money was placed to the credit of witness, and the defendants got the money as fast as they delivered oil. He produced his book shewing the sums they received to which they agreed, \$5487 45. The six cars were forwarded and reached Portland in scattering portions, all arriving there by the 15th of March, and left Portland, he believed, on the 22nd of March. The (ship) Melina, which carried it, arrived at Liverpool on the 20th of April, as he was advised. Plaintiffs were to hold the oil a reasonable time to prevent a sacrifice; he thought two or three months a reasonable time; he told defendants that if secured, plaintiffs would hold six months if necessary; he had received account of sales of this oil, and he had the names of the parties to whom it was sold; the account was submitted to defendants. In July, he was aware, 18 barrels had been lost by leakage. The final sales were made on the 18th and 20th of July, and he was advised of them. The

whole charges on these barrels of oil were £392 3s. 6d., except the commission. The principal sums are moneys paid out. Defendants' oil sold for 1s. 7d., 1s. 8d. and 1s. 9d. per gallon, sterling money. He told Mr. Allen it would be necessary to insure and secure on advances; the shippers requested it. Defendants received the whole amount of the drafts, except the payment for freights and 1 per cent. which they agreed to pay witness on the advances. He gave the defendants a statement of the charges in England, including the $2\frac{1}{2}$ per cent. commission on sales. The conversation as to the 200 barrels took place in the end of March. There was partial leakage besides the 18 barrels which leaked out entirely; the additional leakage was equal to 32 barrels. The defendants agreed on the rate of freights.

For the defence, *R. A. Harrison* objected, that the action should have been on the special contract to consign oil; that there was no evidence of money lent or advanced, money paid or account stated, or of money had and received.

J. H. Cameron, Q. C., answered. That there was no evidence of a special contract—no particular quantity or time of delivery, only an agreement to make advances generally on oil furnished. A nonsuit refused at the trial.

At the trial the learned judge left it to the jury, to find whether the plaintiffs proved their case, or the defendants their plea. The jury found for the plaintiff \$2062 02.

In Michaelmas Term *Harrison, R. A.*, obtained a rule to shew cause why the verdict should not be set aside, and a new trial had between the parties on the ground of misdirection, in this, that the learned judge refused to compel the plaintiffs to elect on which of the several counts in the declaration plaintiffs intended to proceed, or as being contrary to law and evidence because the verdict was general on all the counts, and some only, if any of the counts, were supported by the evidence, or as being contrary to law and evidence, in this, that plaintiffs gave no evidence entitling them to the verdict on any of the counts in the declaration. The remedy, if any, being on the special contract in part performed by defendants, and from which the plaintiffs had derived some benefit, or as being contrary to law and evidence and the weight of evidence, in this, that it was shewn the plaintiffs

received the oil with the understanding that they would not sacrifice it, which they violated ; and in their own wrong now endeavour to recover damages, and that no evidence was given to shew that the oil had been sold by the plaintiffs at the best price that could be obtained for it, or why the verdict should not be set aside and a new trial had upon grounds disclosed in affidavits and papers filed.

In reply the plaintiffs put in affidavits shewing the *bona fides* of the sale, to whom sold, and the prices obtained ; also Liverpool circulars shewing the prices of oil every month in 1863.

S. Richards, Q. C., shewed cause, and contended that there was no special contract shewn which bound both parties. The quantity of oil to be consigned was at the option of the defendants, and the whole dealing shewed it was the ordinary transaction between broker and principal. The affidavits shewed the defendants got the average prices of the whole year, and that since no shipments were made from January, and the sales made in July and August a reasonable time had elapsed, and the plaintiffs were entitled to have their money back as money had and received to their use. There was no misdirection, for the question was whether the defendants made out their plea, which the jury negatived. The affidavits had been fully answered and the plaintiffs had shown that they acted in good faith throughout.

Harrison supported the rule, and contended that the plaintiff could not recover on the common counts but for a breach of the contract for not delivering oil according to the contract. That the plaintiff had committed the first breach by not forwarding the oil from month to month, and had wrongfully sold the oil sooner than they were requested to do, and at prices lower than might have been obtained in September. He relied on *Cutter v. Powell*, 2 Smith's leading cases, 1 ; *Blackburn et al. v. Smith*, 2 Exch. 783, and *Fitt et al. v. Cassanet*, 4 M. & G. 898 ; that the learned judge misdirected the jury, in telling them it was a question on the evidence between the plaintiffs case and the defendants plea ; that they should have been directed that it was a special contract whatever its terms were, and that the plaintiffs could not recover on the money counts.

JOHN WILSON, J.—The plaintiffs rely on their right to recover, by shewing that they made certain advances on oil consigned to them to sell; that their right to recover the money advanced arose when the defendants had ceased to deliver oil, and they had disposed of what they had received. They say, “you entrusted us with goods to sell on commission, on which we made advances to you on the supposition your goods would not only re-emburse us, but bring something beyond. They have been honestly dealt with and sold, but have not paid the advances, let us have our money back. We are of opinion the evidence sustains this view of the case. The defendants say this was not the case; that it was a special contract such as they have pleaded, and if so the plaintiffs cannot recover. But the jury have found against this plea.

It is much to be regretted that this agreement was not reduced to writing, whatever it was. The court and jury would have been saved from much perplexity if the parties had taken this reasonable precaution. The evidence, we think, does not sustain the contract set up by the plea, nor does the conduct of the defendants, while the transactions were going on, accord with the contract set up. The first provision was that they were to deliver all the oil they manufactured, to the plaintiffs, during the fall and winter. They never delivered any after February, nor did they deliver all they manufactured, for they tell the plaintiffs they are filling orders in this market; nor did they consider themselves bound to deliver, for they write, of the arrangement, as only binding them, if the prices in Europe were remunerative; nor did they seem to consider it binding, to have the oil shipped from month to month, for the correspondence is silent on this point; nor was the delay in sending the first 118 barrels complained of, in that correspondence.

We granted the rule chiefly on the ground that the partial view of the case presented in the affidavit of the defendant Holmes, made us doubt whether the plaintiffs had dealt fairly with the oil in Liverpool; but the affidavits of one of the plaintiffs, and the affidavit of the agent of the plaintiffs who sold the oil, satisfies us on this point. We think there was no misdirection, and that the evidence sustains the plain-

tiffs case. The case made by the defendants does not sustain their plea. On reading the affidavits on both sides we do not see that the aspect of the case could be changed by granting a new trial.

Per cur.—Rule discharged.

HENRY HAACKE V. PETER ADAMSON.

Magistrate—Conviction by—Wrongful arrest—Quashing of conviction—Notice of action—Con. Stat. U. C., ch. 126.

Action against a magistrate for wrongful arrest and imprisonment, upon a conviction for selling spirituous liquors without license, contrary to a by-law, &c. The 1st count of the declaration was in trespass, the 2nd in case—to which the defendant pleaded not guilty, by statute, &c.

At the trial the selling of the liquor, for which plaintiff was convicted, was fully proved; also that the conviction had never been sealed. A verdict was rendered for the plaintiff for \$100 on each of the counts in the declaration. On motion, in the alternative, for a nonsuit or a new trial,

Held, 1st. That under sect. 3, ch. 126, Con. Stat., an action of trespass will not lie against a magistrate until the conviction complained of has been quashed.

2nd. That the conviction referred to never having been sealed, it was not necessary to treat it as a valid conviction and to have it quashed before action brought.

3rd. That notwithstanding the conviction was void, the defendant was entitled to notice of action, as he was acting in his official capacity of magistrate and had jurisdiction over the plaintiff and the subject matter, &c.

4th. That as only one wrong was complained of by plaintiff, he cannot recover on the two separate counts, but must elect on which of them he will enter his verdict.

Seemle, that plaintiff cannot recover on the first count because the magistrate had jurisdiction, &c., and by the provision in the statute the action should be in case charging malice.

5th. That on whichever count the verdict is entered the damages must be reduced to three cents under Con. Stat. U. C., ch. 126, sect. 17, as plaintiff was proved "guilty of the offence of which he was convicted," and that in this respect the statute applies as well to actions of trespass as to case.

6th. That the statute does not require any particular addition or description of the magistrate to be given in the notice of action served upon him.

This was an action against a magistrate for an alleged wrongful arrest and imprisonment of the plaintiff, upon a conviction for selling spirituous liquors without license, contrary to the by-laws of the township of Stanley, in the counties of Huron and Bruce.

The 1st count of the declaration was in trespass. The 2nd count in case.

The defendant pleaded not guilty by statute, and he stated the following public acts in the margin of his plea—Consol.

Stats. of U. C., ch. 126, secs. 1 to 20 inclusive; also ch. 54, sec. 243, sub-sections 6, 7 & 8, and A. & B., sec. 246, sub-sections 1 to 6 inclusive, and secs. 248 to 258 inclusive.

The cause was tried at the last Goderich assizes before the Chief Justice of the Queen's Bench, when a verdict was rendered for the plaintiff of \$100 on the 1st count and \$100 on the 2nd count.

At the trial at the close of the plaintiff's case the defendant objected there could be no recovery on the trespass count, nor on the 2nd count, which is in case, because the conviction had not been quashed; that there was a variance between the 2nd count and the notice of action, the declaration stating the defendant was a justice of the peace, the notice not doing so; that the warrant ought to have been quashed before the action was brought; and that there was no evidence of malice.

For the plaintiff, it was contended that the magistrate had no authority to issue his warrant to arrest after the conviction had been removed by *certiorari*, and therefore trespass would lie; that the conviction was bad; it was never sealed. No by-law was proved on which the warrant purported to be founded. If such a by-law did exist, it should have been set forth in the warrant to shew that the warrant was in conformity with it. That there was no variance, the notice being addressed to the defendant as a justice of the peace or acting as a justice of the peace.

The learned Chief Justice overruled all the objections, although with some doubt as to the first count.

The defence was then gone into. It was shewn that after the plaintiff was convicted he admitted there was ample evidence in support of the charge against him of selling liquor without a license. He complained of the amount of the penalty, but it was the smallest which the by-law allowed. The defendant advised him to petition the township council to remit part of the penalty. The plaintiff had been a tavern keeper for fifteen years, and had been a member of the township council; he had been before the defendant as a justice of the peace on former occasions. The township by-law was proved. The plaintiff petitioned the council for the remission of his fine. He had applied for a license but was too

late, as the full number of licenses had been then issued which the council could grant. The selling of the liquor was clearly proved.

The learned Chief Justice left it to the jury to say whether the conviction had ever been sealed, stating if it had not it was invalid, and stating also that the conviction was invalid in not reciting the by-law and showing that it authorized the fining and imprisoning which the conviction imposed. He also left it to the jury to say whether the defendant had issued the warrant after he was aware the conviction had been removed by *certiorari*, and if they found the conviction was not sealed, and that the defendant knew of the removal of the conviction before he issued his warrant to find on the first count for the plaintiff. As to the second count the Chief Justice directed the jury there was strong evidence shewing probable cause for the conviction; an absence of malice, and that the defendant acted *bona fide*; but if the warrant was issued after the defendant knew of the removal of the conviction, that was some evidence of a want of probable cause for issuing it, from which malice might be inferred. Leave was reserved to the defendant to move to enter a nonsuit on the 1st count, if it should be thought, case and not trespass was the proper remedy, and leave was also reserved to the defendant to move to reduce the verdict on the 2nd count, if the jury found for the plaintiff upon that count, to the sum mentioned in ch. 126 of the Consol. Stats. of U. C., sec. 17. The defendant's counsel contended that this section applied as well to the 1st as to the 2nd count, upon which the jury found for the plaintiff as before stated.

II. Cameron, in last Michaelmas Term, moved for and obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered on the first count pursuant to leave, and why the damages on the 2nd count should not be reduced to three cents, according to the statute pursuant to leave, or why the verdict generally should not be set aside and a new trial granted for misdirection in ruling the plaintiff was entitled to recover substantial damages on the 2nd count, and to recover on the 1st count, although the conviction had not been quashed, and in ruling there was no vari-

ance between the notice of action and the 2nd count, and that the defendant acted without reasonable and probable cause, and also why a new trial should not be granted upon all or any of the above grounds, and also because no recognizance having been entered into according to the 5 Geo. II., ch. 19, the defendant was authorized in issuing his warrant, or because the damages are excessive, and because the plaintiff has recovered on both counts for the same wrong; or why the plaintiff should not elect on which count he shall enter his verdict.

This last term *R. A. Harrison* shewed cause. The conviction should have been under the seals of the justices, and as it was not, it was void. Paley on Summary Convictions, 4 Ed. 126, 243; *Regina v. The Inhabitants of St. Paul*, 7 Q. B. 232. A by-law not under seal was refused to be quashed because it was void, the same rule applies to convictions; *In re. Croft*, 17 Q. B. U. C. 269. It should also have recited the by-law under which the justices professed to act. This essential form is now dispensed with by the 27th Vic., ch. 18. That the conviction being bad trespass will lie. *Brooks v. Hodgkinson*, 4 H. & N. 712; *Cameron v. Lightfoot*, 2 W. Bl. 1192; *Gray v. McCarty*, 22 Q. B. U. C. 568; *Lawrenson v. Hill*, 10 Ir. C. L. Rep. 177; *Leary v. Patrick*, 15 Q. B. 266; *Haylock v. Sparke*, 1 El. & Bl. 471; Paley on Convictions, 398-9. As to the 2nd count he referred to *Gray v. Cookson*, 16 East, 13; *Rogers v. Jones*, 3 B. & C. 409; *Bross v. Huber*, 15 Q. B. U. C. 625. There was evidence of malice; *Burney v. Gorham*, 1 C. P. U. C. 358. It was then argued that on issuing the warrant the defendant acted ministerially, not judicially. That the want of a recognizance did not authorize the magistrate to proceed against the *certiorari*, it is only by practice that the courts have extended the statute to convictions; Paley on Convictions, 365-6. As to the recovery on each count he cited *Holford v. Dunnett*, 7 M. & W. 348.

H. Cameron supported his rule, and contended that, even although the conviction should have been under seal, trespass will not lie so long as it has not been quashed; *Gates v. Devenish*, 6 Q. B. U. C. 260. That the magistrate had jurisdiction and therefore could not be a trespasser; that trespass

will not lie under ch. 126, secs. 1, 2 or 3; that *Bross v. Huber*, before referred to, shews that sec. 17 of the statute, applies as well to trespass as to case, and therefore if the plaintiff is entitled to a verdict at all on the 1st count the damages should be reduced to 3 cents; that the notice should have stated the defendant was a magistrate and it is not sufficient that it is directed to him as a magistrate; that the defendant did nothing after he had notice of the *certiorari*, although no recognizance had been entered into, he had issued his warrant before the *certiorari* had issued, though after he had notice that it would be applied for, and all he did after was not to withdraw it; and that the plaintiff must elect as to which count he will take his verdict upon.

ADAM WILSON, J.—The act, ch. 126, provides, sec. 1, “that every action brought against a justice of the peace for any act done by him in the execution of his duty as such justice, with respect to *any matter within his jurisdiction* as such justice, shall be an action on the case, &c.” Section 2, “that in a matter in which the justice of the peace has *not* jurisdiction, or exceeds his jurisdiction, or for any act done under any conviction, order or warrant, any person injured may maintain an action against him in the same form and in the same case as he might have done before the passing of the act.” But that by sec. 3 “no *such* action shall be brought for anything done under such conviction or order until it has been quashed.” These provisions are taken from the Imperial Act, 11 & 12 Vic., ch. 44. An action of *trespass* will not now lie against a magistrate until the “conviction or order has been quashed,” for sec. 1 limits the form of action to case, so long as the magistrate had jurisdiction over the matter adjudicated upon.

There is some little confusion in these provisions for which see *Barton v. Bricknell*, 13 Q. B. 395, and *Leary v. Patrick*, 15 Q. B. 266. The conviction and warrant in this instance have not been quashed, but the plaintiff says the conviction being void for want of a seal, it could not have been quashed, and it is therefore to be treated as if no conviction in law or in fact had ever been made. The Consolidated Act of Canada, ch. 103, sec. 42, requires the “conviction” to be drawn up

in proper form by the justice or justices, under his or their hand and seal, or hands and seals. See also sec. 50.

In the case of *Regina v. The Inhabitants of St. Paul*, before referred to, an exception was taken to the order, that it was not sealed, although there were certain impressions printed as and to represent seals, but that this was not a sufficient sealing; the court however decided the order was sufficiently sealed. In that case the want of seals was one of the grounds taken on motion to quash the order, and it does not seem to have been thought that that would not have been a proper cause for which to quash the order, if the seals had been really wanting. The decision in our own court however, before referred to in 17 Q. B. 269, is against this view, for there the *Chief Justice* said the Municipal Act requires that by-laws shall be under seal,—“if this is not sealed, and it appears that it is not, and never was, it follows that what we are asked to set aside is not a by-law, and we have no power to quash it, nor is there any need that it should be quashed.”

The case *The King v. Austrey*, 6 M. & S. 319, would seem to shew that the court would entertain a motion to quash a certificate for not being sealed, when by the terms of the statute it was required to be under the hands and seals of certain persons, although for the want of such seals the certificate was held to be void. One reason, perhaps, for such an interference may be that a “conviction,” any more than a “by-law,” does not, *ex vi termini*, mean an instrument under seal. A conviction is only the entering on parchment the proceedings of the court which have already taken place, it is like recording judgment in a superior court. *Hutchinson v. Lownds*, 4 B. & Ad. 118. Although the conviction, for want of such seals, may, notwithstanding such defect, be quashed on application, I do not think it follows that it is necessary to do so, for by this material and essential defect in it, it is not such a proceeding as the statute requires, and there is therefore, in point of law, no conviction.

The plaintiff must therefore be considered to be in the like position in seeking for redress by action, when there has been no conviction, as he would have been in if he had succeeded in having the conviction quashed, and to bring an action, if he

chose to do so, for the proceedings wrongfully taken against him, but this action must be in case, under the first section of the act, because the magistrate had jurisdiction.

The conviction being void does not however dispense with the necessity of notice of action to the defendant, as he unquestionably acted as a magistrate in all he did, and had complete jurisdiction over the plaintiff, and over the subject matter upon which he adjudicated, accordingly notice of action was duly served setting forth the two causes of action in the declaration contained; we have no doubt that as only one wrong was done to the plaintiff, and not two different acts, or two wrongs, that the plaintiff cannot recover on two separate counts which represent two distinct causes of action. *Holford v. Dunnett*, 7 M. & W. 348, before cited, and also the case of *Ruthven v. Stinson*, lately decided in this court clearly establish this.

The plaintiff should be put, therefore, to his election as to which count he will enter his verdict upon. We do not think he should have recovered on the first count at all, because the magistrate had jurisdiction of the offence, and by the express provisions of the statute, the remedy in such a case should have been by an action on the case charging malice.

On whichever count the verdict is entered we are of opinion the damages to be recovered should only be three cents, because the plaintiff, by his own showing, was proved very clearly to have been "guilty of the offence of which he was convicted," and in our opinion this section of the statute applies as well to actions of trespass as to case, and we see no reason why there should be any distinction whatever between one form of action and another in this respect. The case above mentioned in 15 Q. B. U. C. 625, is an authority for this construction.

If there should be any question upon the reservation at the trial, as to the defendant's right to have the damages reduced to three cents on the count in trespass, in case the plaintiff should elect to take his verdict upon that count, we shall be obliged to order a new trial generally without costs, and in that event we think the plaintiff should not recover upon either count. Not upon the first count, because the magistrate had

jurisdiction and did not exceed his jurisdiction, nor upon the second count, because there was no conviction proved as is there alleged.

The notice of action is not objectionable, the statute does not require any particular addition or description of the magistrate to be given, and in the absence of such a direction we should be carrying the general inclination of the courts, to maintain magistrates when they have been acting justly and reasonably, quite too far by giving effect to so literal and critical an exception as has been taken to this notice. See Chitty's Forms, 9 Edn. 38; Arch. Pr. 11 Ed. 1290.

We also feel there would be great difficulty in giving effect to the want of a recognizance when all the purposes of the recognizance have been answered, and when the objection to the want of it was not raised at the trial, but was taken for the first time before us upon this application for a new trial.

It may be that the learned *Chief Justice* stated the case rather more strongly against the defendant than may have been quite warranted, but we do not feel quite justified in setting aside the verdict *in toto* upon that account, as there were other circumstances beside this particular one from which malice might, to some extent, be inferred. The point to which we have referred in the learned *Chief Justice's* direction is contained in this part of his charge—"The warrant was issued after notice of the removal of the conviction by *certiorari*. I think this shews a want of reasonable and probable cause for issuing the warrant, from which the jury may infer malice." While according to the case of *Booth v. Clive*, 10 C. B. 827, in which the judge of a county court issued an order for committal of the defendant after the service of a prohibition upon him, the direction to the jury should rather have been, as it was there, "that if the defendant, in making the order, acted under the *bonâ fide* belief that his duty as judge of the county court rendered it incumbent upon him to do so, notwithstanding the prohibition, the act done by him must be considered as done in pursuance of the County Court Act, and that he was therefore entitled to notice,"—which seems to indicate that if a notice of action had been given the like question of *bonâ fides* would have been submitted to the jury for the general acquittal of the defendant.

In the present case *mala fides* was rather assumed from the defendant's issuing his warrant after he had notice of the *certiorari*, than the *bonâ fides* of the act left to the jury; but still, as we have before said, there were other circumstances properly left to the jury as to the defendant's conduct.

The rule will therefore be absolute for the plaintiff to elect upon which count he will enter his verdict, and upon such election a verdict for the defendant will be entered on the other count; that the damages be then reduced to three cents for the plaintiff. On failure of the plaintiff so to elect, or if he elect to enter his verdict on the first count, and refuse so to reduce his damages, then the rule will be absolute generally for a new trial without costs.

Per cur.—Rule accordingly.

PARK V. HUMPHREY.

Trover—Joint contract.

A. & B. having contracted with C. to put in the crops on a certain farm and to do all the necessary farm work thereon for the whole season, and for which they were to have one half of the crops for that year; under the contract A. & B. sowed a quantity of wheat, and B. having absconded, his interest in the wheat, while growing, was sold under an execution issued on a judgment, obtained in the division court, against B. at the suit of D., who became the purchaser thereof. A. subsequently sold all his interest, and that of B. in the wheat, to C., who harvested it. D. having brought an action of trover to recover the one quarter of the quantity of the wheat, claiming to have become the owner of that portion of it by purchase at sale on the writ of execution from the division court, which was produced and proved at the trial, but no certified copy of the judgment signed by the clerk, and sealed with the seal of the court, was produced.

Held, that as between A. & B. the contract was joint, and that trover by D. for the one quarter sold to him, under the execution against B., was not maintainable. *Held*, also, that as against a party whose goods have been sold under an execution from the division court the production of the writ of execution is sufficient, but that as between a *third* party and the vendee under the execution, the judgment in support of it should be shown.

This was an appeal from the county court of the county of Norfolk, in which the plaintiff declared in trover, and on the common counts.

The appellant, on the 27th day of April, in the year 1861, made the following agreement with Millard and Brown: "It is agreed between John J. Park, of the first part, and John Millard and Mark Brown of the second part, that the said John

J. Park will furnish a team of horses and such farming implements as are required for use on the farm, together with seed to be sown on the place, and the parties of the second part agree to do all the work in a good and proper manner and in proper season, and as the party of the first part shall direct; and harvest all the grain raised on the farm, and each party to pay for the threshing of their respective share of the grain raised by the said parties on the farm, the parties of the second part agree further to keep up the fences and repair them when needed for the protection of the crops at their own cost and expense. They also agree to draw and sow the plaster required on the place at their own expense, the first party to furnish the plaster at the bed or mill. The second parties agree to board all threshers who may be engaged to thresh on the place, to dig all the potatoes and other roots and house the share of the party of the first part. They are also to do the haying, and to put two thirds of all produce on the farm in the barn for the party of the first part and they further agree not to go off the place to do any work at any time during the season when their labor is required thereon. This bargain to be for this summer and fall and to cease when the fall work is done."

Hide Park Farm, April 27th, 1861.

For the year 1862-3 the agreement was parol, varied, in this, that Park was not to find horses, and Millard and Brown were to have half, instead of one-third of the crops, for that year.

In the fall of 1862 wheat was sown on about 40 acres. In December, 1862, Brown absconded. On the 7th of January, 1863, one Wood, bailiff of the third division court of the county of Norfolk, sold Brown's quarter of this wheat, then growing, on an execution against his goods, issued out of that court on a judgment recovered by Humphrey, the respondent, against Brown. In July, 1863, Millard sold his own interest in the wheat yet growing, and professed to sell Brown's also to Park, who, in his own right, and by virtue of this sale, claimed all the wheat which he harvested and dealt with as his own. Humphrey, under the sale to him by the bailiff, claimed a quarter of the wheat, and offered to harvest the whole, in

performance, thus far, of Millard and Brown's agreement with Park, who would not permit him to do it. Excepting this offer to harvest it, it did not appear Humphrey offered to do or did any thing else. After Park harvested the wheat, and claimed all as his own, this action was brought to recover one quarter of it.

At the trial before his honor judge *Salmon*, at the sittings of the county court in September last, the plaintiff Humphrey rested his right to recover Brown's share of the wheat, estimated at between 500 and 600 bushels, on proof of the agreement, and that Millard and Brown had sown the wheat, and on proving the sale of Brown's interest in it, under the execution, and on proof of his offer to harvest it, and Park's refusal to allow him. For the defendant it was objected by Mr. *Matheson*, "that the plaintiff could not maintain the action, Millard and Brown being partners, and the court could not enquire what share or interest Brown had in the wheat." The learned judge overruled the objection, giving leave to the then defendant Park, to move against his ruling, if the jury should find against him. The jury found a verdict for Humphrey against Park for \$150.

Next term *Matheson* moved a rule on the 6th October, calling on the plaintiff, upon notice of the rule to be given to him or his attorney, on the eighth day of October instant, to shew cause why the verdict entered for the plaintiff in that cause should not be set aside and a nonsuit entered on the grounds that no sufficient or legal evidence was given, at the trial of the cause, of the judgment, alleged to have been recovered in the third division court for the county of Norfolk by the plaintiff against one Brown, and on the grounds that the plaintiff had no *locus standi* in that honorable court to maintain the action inasmuch as it would be necessary to take an account of the partnership transactions and dealings between said Brown and Millard before he could maintain said action, and on grounds reserved at the trial of the cause. Upon hearing the parties the learned judge gave the following judgment:

Upon the first of the two points raised by this rule, I am of opinion that Millard and Brown were tenants in common, and not partners in the wheat put in on the defendant's farm

on shares, each having a separate, though undivided interest of one quarter in it and that therefore the points raised by *Matheson* on that ground will not apply; that Millard had no power to dispose of or sell to the defendant Brown's interest in the wheat; that the claim defendant had against Millard and Brown was not one incurred on account of this wheat; Brown only signing the note as security for Millard for a pair of horses, in which he had no interest. As regards the other point raised, that it was requisite, in addition to producing and proving the execution issued from the third division court for this county, and the sale by the bailiff, under it, of Brown's interest to the plaintiff; that a certified copy of the judgment, signed by the clerk and sealed with the seal of the court, or the clerk's books ought also to have been produced; I have some doubt on the point, but incline in this case, upon the whole, to think not, more particularly as the plaintiff who purchased from the bailiff is the execution creditor, and would therefore, I take it, not be considered in the light of a stranger, and it was proved by the bailiff that he was present when the judgment was obtained. If a certificate or memorandum of the judgment was absolutely necessary, this is very particularly given in the first part of the execution itself, where the clerk certifies, under the seal of the court, that on a particular day judgment was obtained, specifying the amount of debt and also of the costs, and that it was unsatisfied, shewing on its face that it was matter in which the court had jurisdiction. The defendant purchased the wheat from Millard long after the sale, knowing all the circumstances, and that Brown had left the country, and at less than one-half its value as proved by the plaintiff at the trial, and not attempted to be refuted or denied by the defendant. I therefore discharge the rule, giving the defendant four days to enter an appeal.

Against this judgment Park appealed for the reasons following:

1st. That under the circumstances no action of trover can be maintained.

2nd. That under the circumstances reported by the learned county court judge, there was not sufficient evidence of a judgment to support the bailiff's sale.

During last term, this appeal came on to be heard.

Anderson, for the appellant, contended, that the right was joint and could not be severed, and that Millard had a right to sell the whole to Park. He cited *Hare v. Celey et al.*, 1 Cro. El. 143; *Mayhew v. Herrick*, 7 C. B. 229; *Morgan v. Marquis*, 9 Exch. 145; *Addison on Torts*, 191, 2, 3.

J. Read, for respondent, contended that the bailiff could sell Brown's right in the growing wheat, and that one quarter of the wheat was respondents, who offered to do all Brown was required to do to entitle him to it, and that Millard's sale to appellant only passed his share. He cited *Delisle v. Dewitt*, 18 U. C. Q. B. 155; *Story on Partnership*, 4, secs. 261, 2, 3, 307, 8, 11, 12, 417, 20, 54; *White v. Morris*, 11 C. B. 1015.

JOHN WILSON, J.—Looking at this agreement, we construe it, not as a letting of the land on shares, by which a term and possession of it were acquired by Millard and Brown, but as a contract for remuneration for their care and labour in growing the crops, to be performed by them as Park directed. It is like the case of *Hare et al. v. Celey*, Cro. Eliz. 143. As between Millard and Brown the contract was joint, the remuneration joint, by other crops as well as wheat; any breach of that contract by Park gave them jointly a right of action against him. It does not appear, under these circumstances, that Millard and Brown performed their agreement with Park and could not have severally recovered from him, in an action of trover, a quarter of the wheat. At the time of the sale their right to it had not arisen. But if Brown could not himself recover a quarter of the wheat, Humphrey, his vendee, could not. Before Millard and Brown could have recovered on their joint contract, they must have shown a substantial performance of it, which Humphrey did not attempt to shew. But assume, for the moment, that Millard did perform what he and Brown had agreed to do, although the evidence shews that Brown did nothing after December, and Humphrey, his vendee, offered to harvest the wheat only, could Brown have claimed one-half of the half of this wheat as his, without any assent of Millard to a division of their joint half, or of Park to a division of the whole? They had rights to adjust with

Park, rights to adjust between themselves. But Humphrey is, at most, the vendee of Brown by means of the sale on the execution. For all the purposes of dealing with this question, Millard and Brown were contractors in this joint enterprise; neither could, as between themselves, have asserted the right to take half of the half of the wheat, without adjusting the debts and accounting for the labor and debts incurred in respect to it. The horses were Millard's. It was the work to be performed by them, we infer, which entitled Millard and Brown to half the crops instead of one-third, as it had been when Park found the horses. We think Brown could not have brought trover against Park for this wheat, and therefore Humphrey, his vendee, cannot.

This virtually disposes of the case, but we are asked to dispose of the other point. As against the party himself whose goods have been sold by the bailiff under execution, it is enough to show an execution, but as between a third party and a vendee under an execution we think the judgment in support of it ought to be shewn.

Judgment will be to allow the appeal and to direct the court below to enter a nonsuit, pursuant to the leave reserved.

Per cur.—Appeal allowed.

BAKER ET AL. V. VANLUVEN.

Agreement—Substantial performance—Acceptance and acquiescence—Work and labour, &c.

A. having signed a writing, not under seal, in the following words: "To William Baker, Christopher Vanluven, John Ansley, Zadoc Wright, and John Hughes, gentlemen,—We, the undersigned, understanding that you have resolved to build a church 30 × 40 feet, at a cost of \$1000, in the village of B., do hereby covenant and promise to pay you the several sums opposite our respective names, to assist you in the erection of the said church, and we bind ourselves to pay a fourth of said subscription every three months, and that the whole be paid on or before the 1st of October, 1860,"—and the parties having built a church at the place named, thirty-six feet wide by forty-eight feet long, and of the value of \$1200, with which A. found no fault, but had a pew therein cushioned for his own use, which he had always occupied. *Held*, that the church built was a substantial performance of the agreement, and *held* also, that by the acquiescence and acceptance of the work by A. a new contract might be inferred in which A. would be liable for work and labour and materials provided.

This was an action, brought in the county court of the

united counties of Frontenac, Lennox and Addington, to recover \$100 and interest, being a subscription, by the defendant, for building a church, in the following words :

“To Wm. Baker, Christopher Vanluven, John Ansley, Zadoc Wright and John Hughes, gentlemen,—We, the undersigned, understanding that you have resolved to build a church 30×40 feet, at a cost of \$1000 (one thousand dollars) in the village of Battersea, do hereby covenant and promise to pay you the several sums opposite our respective names to assist you in the erection of said church, and that we bind ourselves to pay a fourth of said subscription every three months, and that the whole be paid on or before the 1st of October, 1860.” It was not under seal.

The declaration contained a special count on this contract averring performance, and also the common counts.

The defendant pleaded to the first count, that the plaintiff did not erect and build a church in the village of Battersea in manner and form as in the declaration alleged. He pleaded never indebted to the common counts.

The cause was tried before the judge of the county court of the united counties of Frontenac, Lennox and Addington, at the sittings held at Kingston in December last.

The plaintiffs proved that the defendant subscribed the instrument, that a church had been built by them, which had been called the “Wesleyan Church,” and had been dedicated and opened for divine service in the year 1861; that the defendant had a pew cushioned in the church for his own use, which he has always occupied; that some trouble had arisen between the defendant and plaintiffs; that the defendant did not find fault with the church, but said it was larger than the specifications. The church was, in fact, 36 feet wide by 48 feet long, and worth \$1200. The defendant made no objection to the building until he was called upon for his subscription.

For the defence it was objected that the defendant had agreed to pay for a church 30 feet by 40 feet; that the one built was 36 feet by 48 feet; that the defendant never promised to pay for such a church.

Leave was reserved to move to enter a nonsuit on the objections taken.

The jury was charged to return a verdict for the plaintiff if they believed the defendant promised to pay the \$100 mentioned in the subscription, and that they might allow interest if they thought proper. The verdict was for the plaintiffs for \$112.

In January Term of the County Court, *Gilderslieve* obtained the following rule:—It is ordered that the plaintiff, upon notice of the rule to be given to his attorney, shall, within four days, shew cause why the verdict obtained in this cause should not be set aside and instead thereof a nonsuit entered pursuant to leave reserved at the trial of this cause, on the following grounds: that the plaintiffs at said trial proved the performance, by them, of a different contract from that alleged in their declaration, namely, the erection of a church of the size, thirty-six feet in width by forty-eight feet in length, instead of a church thirty feet in width and forty feet in length, as alleged in said declaration as forming the consideration of the defendant's promise declared on, and in the mean time all proceedings be stayed.

Sir Henry Smith, Q. C., shewed cause.

C. F. Gilderslieve was heard in support of the rule, whereupon the learned judge delivered the following judgment:

The conduct of the defendant in resisting the payment of his subscription because the plaintiffs have built a larger church, a better church, and a more valuable church than the one contemplated, appears to me, to say the least of it, unreasonable and out of the ordinary course of things. The defendant, however, has a right to avail himself of every advantage which the law allows him in resisting this suit. On examining the pleadings and evidence, and in looking into the authorities the court finds itself compelled to hold that the plaintiffs cannot recover on the present record. The main question is, what is the issue raised by the first plea. The plaintiffs allege, in their declaration, that in consideration that the plaintiffs would cause and procure to be erected and built a church in the village of Battersea, of the size 30 feet in width and 40 feet in length, at a cost of \$1000, the defendant promised that he would pay them \$100 on the 1st of October, 1860, followed with an averment that the plaintiffs

did cause and procure the said church to be erected and built. The defendant pleads, "that the plaintiffs did not cause and procure to be erected and built, a church in the manner and form as in the declaration alleged." There can be no misunderstanding as to the issue thus raised. The plaintiffs assert that they caused a church 30 feet in width and 40 feet in length to be erected at a cost of \$1000. The defendant denies the allegation in direct terms. The evidence produced at the trial proved that the plaintiffs erected a church 48 feet in length and 36 in width at a cost of about \$1200. The court cannot say that 48 and 36 amount to the same thing, or that 36 means 30. The evidence sustains the plea and disproves the allegation in regard to the erection made in the declaration. The dimensions of the church, and the cost of it, have been made material allegations of the declaration. The defendant has traversed them as such and according to the evidence the issue should have been found for the defendant unless it can be said that 30 feet express the same thing as 40 feet, and 36 feet the same thing as 48 feet, and \$1000 represents the same amount as \$1200. The arguments addressed to the court upon shewing cause to the rule, so forcibly by *Sir Henry Smith*, appears to me have been predicated on an erroneous assumption of the relation between the parties, namely, that the church was built for the defendant, by the plaintiffs, under a contract to build between them. This is not the case. The consideration upon which the promise to pay the \$100 is founded is treated as a contract to build between the present parties. The consideration upon which the defendant promised to pay the plaintiffs \$100 is set out in that declaration as follows: "that the plaintiffs would cause and procure to be erected and built a church of the size 30 feet in width and 40 feet in length, at a cost of \$1000, for the use of the defendant and others." This consideration is prospective and conditional, and the execution of it, as laid in the declaration, is a condition precedent to the performance of the promise by the defendant. The plaintiffs have alleged in their declaration an execution of the consideration in the terms of the contract, but the evidence has shown that it was executed in a different manner and at variance with that alleged in the declaration.

On a party subscribing to a church or shanty he has a right to make his own terms, and trustees and committees may make their terms also, but trustees cannot compel a subscriber to pay if they depart from the terms of the subscription. The present plaintiffs, in building a larger church and a more extensive one than that mentioned in the declaration and subscription book, have so departed. The defendant had an undoubted right to say to the plaintiffs, I will subscribe \$100 towards the erection of a church for the Wesleyan Methodists at Battersea, of certain dimensions, that is to say, 30 feet wide and 40 long, but I will not give a cent towards a church built for the Presbyterians or Roman Catholics, or any other body than the Methodists, or towards any church of larger dimensions than 30 feet in width and 40 feet in length, and this in effect is what he has really said. To meet the evidence the plaintiffs should have alleged that they have executed the consideration on which the defendant promised to pay the \$100, by causing a church to be erected of the size of 36 feet in width and 48 feet in length, at a cost of \$1200. Such a declaration would, I apprehend, be held bad on demurrer. It is true enough that when a contract has been entered into for the building of a house for a certain sum of money, to be paid on the completion of the building in accordance with certain plans and specifications, it is not necessary to the maintenance of an action upon the contract that there should be an exact performance of the contract in every minute particular, substantial performance is sufficient. The present action is not brought upon a building contract but upon a promise to pay \$100 towards the erection and building of a church to be built of a certain dimension and of a certain value. The defendant had it not in his power to accept or reject the building. He had nothing to do with the building of the church, but he has promised to contribute towards the erection of a church of specific dimensions, of a specific cost, and to no other according to the evidence. The proof is that the plaintiffs have built an edifice of different dimensions and of different value from what they allege in their declaration to have built. They cannot be said to have substantially executed the consideration. They have erected a church, it is true, but not

in the terms of the agreement on which the defendant promised to pay the one hundred dollars. This is not a case on which the plaintiffs can fall back on the common counts and recover upon the *quantum meruit*. This is not an action by the builders on a building agreement to recover the contract price, or to recover the value of the work done and materials found against a party who has accepted the building and enjoys the possession. The fact that the defendant rents a pew in the church cannot make any difference; any person who conforms to the rules of the church, and can pay for a pew, may rent it. If a man declares upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from what is laid, he cannot recover on either count; not on the first because of the variance, nor on the second because there was a special agreement; but if he prove a special agreement, and the work done, but not pursuant to agreement, he shall recover upon the *quantum meruit*. It cannot be said, in a legal sense, that the church at Battersea was erected in pursuance of any agreement with the defendant, or that any work was done or performed for him in regard to it. The contract for the building of it was with the plaintiffs themselves, and the work performed in the erection of the church was performed for them and not for the defendant. It is for the plaintiffs to consider whether a special replication might not bring the defendant to a proper sense of duty, or whether relief cannot be had in another quarter on a ground of a knowledge of the deviation and acquiescence in them; on the present record under the evidence, I think the plaintiffs cannot recover. Therefore the rule to enter a nonsuit must be made absolute. I would refer to *Neale v. Ratcliff*, 15 Q. B. 916; *Beech v. White*, 4 P. & D. 399; *Friar v. Grey et al.*, 15 Q. B. 891; *Porcher v. Gardner*, 8 C. B. 461; *Meniaeff v. Read*, 7. C. B. 139; *Wm. Saund.* 319; *Hill v. Mount*, 18 C. B. 72; *Thompson v. Gillespy*, 5 E. & B. 209.

From the judgment of the County Court the plaintiffs appealed to the Court of Common Pleas, and contended that the verdict for the plaintiffs rendered in this cause should stand and that the rule for a nonsuit should have been discharged

on the grounds that the plaintiffs have proved that the contract set out in the declaration has been by the plaintiffs substantially performed; that the work done by the plaintiffs had been accepted by the defendant; that the plaintiffs did not prove the performance of a different contract from that alleged in the declaration; that under the common counts of the declaration the plaintiffs are entitled to recover under the evidence.

Sir H. Smith, Q. C., for the appellant, contended, that there was a substantial performance of the contract and an acceptance of the church. Addison on Contracts, 5 ed. 410, 1040; Saund. on Pleadings and Evidence, 2 vol. 961; Ireson v. Mason, 13 U. C. C. P. 323; O'Kell v. Smith, 1 Starkie, 107; Fisher v. Samuda, 1 Camp. 190; Lucas v. Godwin, 3 Bing. N. C. 737; Chappel v. Hicks, 4 Tyr. 43; Stavers v. Curling, 3 Bing. N. C. 355; Good v. Harper, 3 Q. B. U. C. 67; Basten v. Butter, 7 East. 484; Moneypenny v. Hartland, 2 C. & P. 378; Wetherell v. Bird, 2 Ad. & E. 373; Hayselden v. Staff, 5 A. & E. 161.

A. Crooks, Q. C., for the respondent, contended that the building of the church of the size mentioned in the subscription list was a condition precedent to the paying the subscription, and that there was not a performance of the contract so as to entitle him to recover. He cited *Munro v. Butt*, 8 El. & Bl. 738; *Cutter v. Powell*, 2 Smith, L. C. 1, 19, 30; *Siewewright v. Archibald*, 17 Q. B. 103; *Gaskin v. Counter*, 6 U. C. C. P. 99; *Munro v. Butt*, 4 Jur. N. S. 1231; *Blyth v. Samuda*, 2 F. & F. 430; *Cross v. Elgin*, 2 B. & Ad. 106.

JOHN WILSON, J.—With deference to the opinion of the learned judge, we think he was mistaken in applying to this case the principle in the leading case of *Cutter v. Powell*, and on all the cases depending upon it. It belongs, we think, to that class of cases, in which a substantial performance of the contract is all that is required to entitle the party to recover who has thus performed it; or to that class of cases, where by acquiescence and acceptance of the work, a new contract may be inferred so as to entitle the plaintiff to recover for his

work and materials. Here the essence of the contract was the building of a church, for the use of a certain denomination, who were to use it, and the parties who used it would seem to be those who were entitled to say how far the building was constructed according to the contract. True, its dimensions and value were stated, and it exceeded them in both particulars, but it was built satisfactorily, from all that appears, to every one interested, to those for whom it was built and who were to occupy it, and to the appellant himself, for he found no fault with the building, and he took a pew which he fitted up for his own use and occupied. He did not object to the size of the building until called upon to pay his subscription. We are of opinion the learned judge was right in his first impression of the case. The jury would have been well warranted in finding, as matter of fact, that the contract was substantially performed, and they in effect so found it, by finding a verdict for the plaintiff. It would seem unreasonable that the defendant should allow the plaintiffs to go on with the building, of the increased size, and after it was all finished in strict accordance with the contract in every other particular, and, after using and occupying it, then turn upon them and say, "you have not performed your contract."

We think the judgment of the court below should be reversed, the rule for a nonsuit discharged, and the postea given to the plaintiffs.

Per cur.—Appeal allowed.

MEMORANDA.

During this term the following gentlemen were called to the bar:—JAMES FOX SMITH, AUGUSTUS ROCHE, MICHAEL SULLIVAN, JOHN WESLEY BEYNON, STEPHEN FRAULIN LAZIER.

In Hilary vacation the Honourable JOHN ALEXANDER MACDONALD, one of Her Majesty's counsel, was appointed Attorney-General, in the room of the Honourable JOHN SANDFIELD MACDONALD, resigned.

The Honorable JAMES COCKBURN, one of Her Majesty's counsel, was appointed Solicitor-General, in the room of the Honourable ALBERT NORTON RICHARDS, resigned.

EASTER TERM, 27 VIC. (1864).

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

MILLS V. KING.

Chattel Mortgage—Description in—Delivery.

C. & J. by chattel mortgage, dated the 6th of February, 1863, conveyed certain goods mentioned and described in schedules attached thereto to the plaintiff. Some of the goods mentioned therein were, at the time, in possession of the manufacturer, one Reid ; other portions were in certain rooms in the American and Burlington Hotels. The description given merely designated a portion of the property by locality, giving no particular description, and was as follows:—"All and singular the goods and chattels, furniture, " household stuff and articles particularly mentioned and expressed in the " schedule hereunto annexed, and which are now in the warehouse of James " Reid, in the City of Hamilton, and are about to be placed in the building " known as the Burlington Hotel." (The schedule begins)—"Schedule " mentioned and referred to in the annexed indenture: one set parlour " furniture, &c. (describing some articles), in parlour H. One walnut " bedstead, &c. (describing several articles), in parlour C.

The writ under which the seizure by the sheriff took place was received by him on the 27th May, 1863 ; at the suit of the defendant against C. & J.

Held, 1st. That all the goods in the schedule which were described as having been in certain rooms in either of the hotels, did upon the authority of *Fraser v. the Bank of Toronto*, 19 Q. B. U. C. 381, and *Powell v. the Bank of Upper Canada*, 11 C. P. U. C. 303, pass by the mortgage.

2nd. That all the goods described as being in certain rooms, and which were not in those rooms at the time did not pass.

3rd. That goods described specifically, as one omnibus, &c. &c. (without any local description) passed under the authority of the cases above referred to ; also, because the description would be sufficient in an action of detinue.

4th. That all the goods which were the property of the mortgagors in Reid's warehouse (being made at the time of executing the mortgage) passed under the mortgage as a distinct grant from those in the schedules.

Some goods not mentioned in the schedules were delivered by one of the mortgagors to the plaintiff's agent, on the 4th of May, 1863 ; the sheriff received the writ of execution on the 27th of the same month.

Held, that such delivery, before the writ came to the sheriff's hands, was good against the sheriff.

An Interpleader was ordered in this matter to determine whether the goods mentioned in the schedule annexed to this record, and which had been seized by the sheriff of Wentworth

under a *feri facias* issued by the present defendants against William Howard Clough and Charles Blair Jones, were, or some part thereof was, at the time of the delivery of the writ to the sheriff, on the 27th of May, 1863, the property of the plaintiff Samuel Mills as against the defendants.

The issue having been entered for trial at the last fall assizes at Hamilton, a verdict was taken for the plaintiff subject to the award of William Craigie, Esquire, who was appointed arbitrator by order of *nisi prius*.

The arbitrator duly made his award, and at the request of parties stated the facts set forth in a case for the opinion of this court.

The case referred to a number of schedules of goods, some of which were, and some of which were not to be considered by the court.

It will only be necessary to refer to schedule G hereafter mentioned, which seems to embody all the goods in question arranged under different subdivisions.

After the 28th of February, 1863, and until the seizure by the plaintiff, on the 4th of May thereafter, the furniture in rooms H, D, B, and dining room (but not in C) in general corresponded with the description in the mortgage schedule of the furniture in these rooms respectively.

Certain goods in paragraph 6 of the award had before the mortgage been ordered by Clough and Jones, of Reid, and were afterwards made by him for them, but they were not made until after the date of the mortgage, and the property in them was not vested in Clough and Jones at that date. They were afterwards delivered to C. & J. at the Burlington Hotel, between the 14th and 28th of February, along with two other single paliasses which had been ordered after the date of the mortgage.

Six out of twenty-six of the double mattresses had been bought by Clough and Jones from Reid before the date of the mortgage, and at that date were the property of Clough and Jones in the American Hotel.

As regards certain goods in paragraph 7 of the award, the plaintiff has not shown where they were at the date of the mortgage, nor what particular goods were intended to be

comprised therein. But Clough and Jones had at that date goods of a like description both in the Burlington and in the American Hotels, in greater number in all than the quantities mentioned in the mortgage schedule.

All the goods in paragraphs 3, 4, 5 and 6 of the award, and goods of the same description as those referred to in paragraph 7 excepting what were in the plaintiff's possession as a boarder as before stated, and excepting what was parted with by Clough and Jones, who had taken them before the 4th of May out of the county without the plaintiff's consent, remained in the Burlington Hotel in the possession of Clough and Jones from the end of February until the 4th of May.

On the 4th of May, 1863, the plaintiff, by Davis as his agent, entered into the Burlington Hotel for the purpose of taking possession of the goods under the power in the mortgage contained, excepting such portions of them as were then in the plaintiff's use and possession as such boarder.

At that time it was, and it remained impossible to distinguish a number of the goods in the mortgage schedule mentioned from those of the same nature and description which then were in the Burlington Hotel in greater number.

Jones, on the 4th of May, accompanied Davis through the Burlington Hotel, and pointed out to him goods which he stated to be the goods comprised in the mortgage, and which were of a similar character to the goods therein described.

The plaintiff, by Davis, his agent, then took possession of all the goods in the Burlington Hotel, and (excepting those in schedule F and not in issue) kept possession until the seizure by the sheriff; not having set apart the number or quantity mentioned in the mortgage from the rest of the same nature which were incapable of being distinguished or identified from those specified in the mortgage.

On the 4th of May, when the plaintiff seized, Clough and Jones were insolvent.

This term, *Crooks*, Q. C., for the plaintiff, contended, that all goods completed by Reid for Clough and Jones, though still in Reid's warehouse at the time the mortgage was executed, passed to the plaintiff, and that as to those goods which were in Reid's warehouse at that time, but which

were not finished, they still passed to the plaintiff, because they were delivered by Clough and Jones to the plaintiff before they were taken by the sheriff.

That the plaintiff is entitled, certainly, to the goods which he had sold to Clough and Jones, and of which the plaintiff was in possession as a boarder, as stated in the case.

That as to all goods which passed by the mortgage, the plaintiff is entitled to retain those which were delivered to him by Clough and Jones, as the goods which had been mortgaged in those instances where the precise articles could not be identified from others. He referred to *Holroyd v. Marshall*, 9 Jur. N. S. 213, 7 L. T. N. S. 172; *S. C.* in House of Lords; *Reeve v. Whitmore*, 9 Jur. N. S. 1214 *S. C.* 7, L. T. N. S. 839; *Edwards v. English*, 7 El. and Bl. 564; *Aldridge v. Johnson*, 7 El. and Bl. 885; *Hanson v. Meyer*, *Tudor's Leading Cases on Mercantile Law*, 520; *Coleman v. McDermot*, 5 C. P. U. C. 303; *Sills v. Hunt*, 16 Q. B. U. C. 521; *Haggart v. Kernahan*, 17 Q. B. U. C. 341; *Bank of Australasia v. Harris*, 8 Jur. N. S. 181.

Burton. Q. C., contra.—No goods in Reid's warehouse passed but those in the schedule, and none of the goods in the schedule passed which were described as then being in parlours H, C, D, and B, for there were no such parlours in Reid's warehouse, and it is not declared where these parlours were. After acquired property will not pass, unless it was in existence at the time of the grant, or unless there is an express authority to take it, and it is taken under such authority. He referred to *Kingston v. Chapman*, 9 C. P. U. C. 130. [*The Chief Justice* referred to *Hart v. Reynolds*, 13 C. P. 501.]

As to the sufficiency of the description, he referred to *Fraser v. The Bank of Toronto*, 19 Q. B. U. C. 381; *Powell v. Bank of Upper Canada*, 11 C. P. U. C. 303; *Moffatt v. Coulson*, 19 Q. B. U. C. 341; *Hiscott v. Murray*, 12 C. P. U. C. 315; *Rose v. Scott*, 17 Q. B. U. C. 385; *Harris v. Commercial Bank*, 16 Q. B. U. C., 437; *Cameron v. Stevenson*, 12 C. P. U. C. 389; *Feehan v. Bank of Toronto*, 19 Q. B. U. C. 474.

ADAM WILSON, J.—From these facts, it appears it is the goods in schedule G. which are the subject of the present litigation; they are the goods which were seized by the sheriff under the defendant's execution, and they are subject to different considerations:

Those marked with the letter (*a*) are part of the goods described in schedule D, and were in the Burlington Hotel at the date of the mortgage.

Those marked (*b*) are not specified in any schedule; they belonged to Clough & Jones, and were also in the Burlington Hotel at the date of the mortgage.

Those marked (*c*) are not contained in any schedule either. They are part of the goods in paragraph 3 of the award, which were ordered from Reid, by Clough & Jones, but they were not made, nor were they vested in Clough & Jones at the date of the mortgage.

Those marked (*d*) are contained in schedule B [the washstand and dressing-table in parlor D], and are part of the goods got from Reid, which were made and set apart in his warehouse for Clough & Jones at the date of the mortgage.

Those marked (*e*) are the goods in schedule E, which belonged to Clough & Jones, at the American Hotel, at the date of the mortgage.

Those marked (*f*) are the goods in part 2 of schedule D, and are the goods which the plaintiff had sold to Clough & Jones, and of which the plaintiff had the use as before stated, as a boarder in the Burlington Hotel, with Clough & Jones.

With the exception of the last mentioned portion of goods, and excepting also those that the plaintiff claimed by reason of the delivery by Clough & Jones to him, of the goods, made by Reid, but not delivered till after the date of the mortgage; the plaintiff has no other title, and professes to have no other title than that which the mortgage may confer upon him.

The first question, then, is, what goods does the mortgage transfer to the plaintiff?

The grant is of "All and singular the goods and chattels, "furniture, household stuff and articles particularly mentioned and expressed in the schedule hereunto annexed, "and which are now in the warehouse of James Reid, in the

“city of Hamilton, and are about to be placed in the building known as the Burlington Hotel.”

The schedule referred to begins :

“Schedule mentioned and referred to in the annexed indenture :

“1 set parlour furniture,” &c. [describing then some few articles].

“In parlour H.

“1 walnut bedstead,” &c. [describing several articles].

“In parlour C.” &c.

And so it proceeds, enumerating sundry articles, as if they had all been then in these different rooms, and it concludes with a detail of carriages, harness, horses, oil-cloth in lower hall, oil-cloth in upper hall, carpet in office, carpet in drawing-room, carpet in bed-room, stoves, stovepipes in dining-room, reading room, kitchen, and passage, and a variety of other articles. We are told expressly that some of the goods in the schedule were in the American Hotel, some in the Burlington Hotel, and nearly all that are described as in parlours H, C, D, B, were in reality in Reid’s warehouse.

Is the mortgage then to be read as conveying two distinct parcels of goods, namely, those contained in the schedule, and *also* those represented to be in the warehouse, but as about to be placed in the Burlington Hotel? Or only one parcel of goods, namely the scheduled goods, which were then in the warehouse, and which were about to be placed in the Burlington Hotel?

The grant of all the goods in the schedule is quite complete by itself down so far, and the question is, whether what follows about the warehouse, restricts and qualifies all that goes before to such goods only as were in the warehouse; or whether such subsequent portion is an addition to and extension of the grant?

It is very obvious, from the fact that the latter part, if it is to operate as a qualification of what precedes, is repugnant to it if the grant be read that *all* the goods in the schedule mentioned were *then* in Reid’s warehouse, for the carriages, harness and horses can scarcely be supposed to have been in a furniture warehouse; nor can it be supposed that parlours H. C. D. & B. were in this furniture warehouse; nor that

the carpets in the office, halls, bed-rooms and other rooms, nor the stoves, &c., in the halls, dining-room and reading-room, were in such furniture warehouse. But if it is to be read, not that *all* the goods in the schedule were then in Reid's warehouse, but *that only such of them as were in the warehouse were granted*; then, however erroneously in fact it may represent the understanding of the parties, there is no repugnancy on the face of the deed itself.

There can be no doubt about the rules of construction to be observed with respect to deeds and other instruments; the difficulty is only in their application at times: for, while we are to give effect to the intention of the parties, if it be possible, we can only gather that intent from the words which the parties themselves have employed, and from the surrounding facts and circumstances. *Shore v. Wilson*, 9 Cl. & F. 555; *Macdonald v. Longbottom*, 29 L. J. Q. B. 256; *Mumford v. Gething*, 7 C. B. N. S. 305.

If there be any ambiguity, we may act with somewhat greater latitude in our interpretation, if we have anything to guide us, such as a recital, or other expressions, in forming our opinion, than when the instrument is free from all doubt and ambiguity.

We shall state a few cases upon the construction of deeds, from which it may appear in what manner the present grant, we think, should be read:

In *Walsh v. Trevanion*, 15 Q. B. 733, the words were, "all and singular the messuages, &c., situate, &c., and which are intended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description hereinbefore expressed and contained."

Mr. Justice *Patteson*, in giving the judgment of the court, said:—"These words are not clear and unambiguous: they may either include all the lands of the parties situate in the manor and parishes mentioned, whether those lands be specified and described in the schedule or not; or they may include only such lands in the same manor and parishes as are virtually and in substance specified and described in the schedule, though they may be imperfectly and inaccurately so specified and described.

“The latter meaning is the more sensible and probable one to be collected from the words used, independently of any supposed intention of the parties, or any other parts of the deed; at any rate, the former meaning is not clear and unambiguous.”

He afterwards says :

“In the mortgage, the concluding words are, ‘which are specified and described in the schedule hereunder written,’ whereas, in the deed, the concluding words are, ‘*and* which are intended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description hereinbefore expressed and contained.’”

“The insertion of the word *and* makes no real difference in the sense of the passage, and the qualifying words relate only to the operation of the schedule, and must be taken in the latter of the two meanings we have formerly mentioned; otherwise, the appointing part of the deed and the granting part will relate to different lands, which is absurd.”

In *Barton v. Dawes*, 10 C. B. 261, a similar question arose :

Wilde, C. J., in giving judgment, said, “The deed professes to convey the several enumerated closes of land, belonging to a messuage called Gotton Farm; but it proceeds to state that Gotton Farm consisted of the closes named in the schedule and delineated in the plan; and there is no doubt that the closes named and delineated were called Gotton Farm, and therefore satisfied that general description, but of whatever else Gotton Farm might have consisted, the closes named and delineated were alone intended to pass.”

In *The King v. Wright*, 1 A. & E. 434, *Tindal*, C. J., said:—“We think the authority cited from *Finch’s law* is decisive,” which is, that “words of construction must be referred to the next antecedent *where the matter itself doth not hinder it*.”

In *Roe v. Lidwell*, 11 Ir. C. L. Rep. 320 Exc. Ch.; see 9 Ir. C. L. 184, C. P. S. C., in a deed conveying :

“The town and lands of Dromardmore, situate in the barony of J. and county of T., containing 1085*a.* & 23*p.*, or thereabouts, and described in the annexed map, with the

appurtenances;" and it was proved that the map annexed to the deed comprised a portion of the lands called Dromardbeg, and not Dromardmore; it was held that the first description in the deed of the lands of Dromardmore being sufficiently complete and certain, should prevail over the second description, comprised in the words, "described in the annexed map," and that nothing passed by the deed which was not part of Dromardmore.

In *Doe dem Smith v. Galloway*, 5 B. & Ad. 43, under a lease of "all that part of the park called B., situate and being in the county of Oxford, and now in the occupation of S., lying within certain specified abuttals, with all houses, &c. belonging thereto, and which now are in the occupation of S.;" it was held that a house on a part which is within the abuttals, but not in the occupation of S. will pass.

Lord *Denman*, C. J., said:—"Suppose the premises had been described by reference to a coloured plan, and the words had been 'all the part coloured green, and now in the occupation of A. B.' all the green must have passed, though some of it had not been in the occupation of A. B."

Littledale, J.—"If the words 'now in the occupation of R. S.' had followed the words 'county of Oxford,' directly, there might have been some ground for contending that the lease was intended to pass only all the part of Blenheim Park then in the occupation of S. Even then, it would have admitted of considerable doubt whether such a construction were admissible; but the interposition of the word *and* precludes it altogether. It is contended that the words, 'now in the occupation,' &c., are an essential part of the full description: if that were so, the description would mean much more than is suggested, for S. occupied in B. park much beside that which the lessors had the power of passing. That which follows 'the county of Oxford,' is merely what is called 'false demonstration;' and false demonstration cannot restrict."

Parke, J.—"The rule is clearly settled that when there is a sufficient description set forth of premises, by giving the particular name of a close or otherwise, we may reject a false demonstration; but that if premises be described in general terms, and a particular description be added, the

latter controls the former." He also lays some stress on the word *and* in like manner as Mr. Justice *Littledale* did. In *Wood v. Rowcliffe*, 6 Exch. 407, a bill of sale of "all the household goods and furniture of every kind and description whatever in the house No. 2, Meadow Place, more particularly mentioned and set forth in an inventory or schedule of even date herewith, and given up to R. on the execution thereof." The inventory did not mention all the goods in the house. Held, that no goods passed under the bill of sale except those specified in the inventory; that this was not a case of false demonstration, but that the operative words of the bill of sale were restricted by what followed. *Barton v. Dawes*, 10 C. B. 261, and *Morrell v. Fisher*, 4 Exch. 591, are relied upon. In the latter case a devise of "all my leasehold farm, house, homestead, lands and tenements at Headington, containing about 170 acres, held under Magdalen College Oxford, and now in the occupation of B. as tenant to me." Held, not to pass two small parcels of land held under Magdalen College, which were not in the occupation of B.; that the words "in the occupation of B." were restrictive of the preceding *general* words, all my leasehold lands, &c., and that they were general because the acreage, which was the only particular statement, was quite incorrect, it is clearly stated that if there had been "a sufficient certainty, the false description of the lands being in the occupation of Burrows would have been rejected as inapplicable. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation to pass only those lands wherein the circumstances are true."

If the question were only whether the latter words "and which are now in the warehouse, &c.," were to be taken as qualifying the precise description already given by a reference to the schedule, we should say from the latter cases above quoted that they have not such an effect, because the grant of all the goods "particularly mentioned and expressed in the schedule annexed," is "a sufficient description set forth of the property," according to the language of Mr. Justice *Parke*, just quoted, and the rest which follows might be rejected as a false demonstration, and because also the

language "*and* which are now in the warehouse, &c.," by reason of the word *and* shews more emphatically that this is only a cumulative description of that which has been already described.

But the question is not whether these latter words are to be taken as a qualification of the preceding grant, by rejecting them altogether as cumulative only and unnecessary, for the grantee contends that they are a substantive and additional, or rather confirmatory grant of all those goods which are described as "now in the warehouse, &c.," inasmuch as many of the goods which are set forth in the schedule as being in certain parlours, were not in truth at that time in these parlours, but were in reality in the warehouse, although they were then intended to be, and were in fact afterwards placed in the parlours, and therefore the plaintiff contends that the mortgage should be read as a grant of all the goods described in the schedule, and which are also in the warehouse, or in other words, that the mortgage should be read as a grant of all the "scheduled goods," whether "they" are situated in the parlours or rooms, as described in the schedule, or in the warehouse of Reid, or that it should be read as a grant of all the goods in the schedule, and *also of all the goods* which were then in the warehouse.

The difficulty in rejecting the latter words would be that all the goods which were then in truth in the warehouse and not in the rooms, in the schedule mentioned, would not pass, because they would not be sufficiently described or identified according to the statute, so that they must be read either as an additional grant or as an additional and better description of such of the goods in the schedule mentioned as were really in the warehouse.

That such latter words would not invalidate the former *valid grant*, if they were shewn to be unnecessary, seems to be clear; but it does not follow that they should therefore be rejected if any proper meaning can be given to them, for as Mr. Justice *Maule* says in *Dyne v. Nutley*, 14 C. B. 125, "the rule of construction is that you must satisfy all the words if you can consistently." Now this may be done by giving effect to such words as a grant *also* of the goods in the warehouse.

This is a case of ambiguity, and as Mr. Justice *Coleridge* says in *Reg. v. The Inhabitants of Wooldale*, 6 Q. B. 565 : “In all cases [of the construction of deeds] there must be some parol evidence. In the case of the simplest deed naming *John Smith*, you must have evidence to apply it to the particular person.” This deed must be read as if the schedule had been set out verbatim in it. *Llewellyn v. Earl of Jersey*, 11 M. & W. 189.

The wording of the mortgage is as before stated, “all the goods particularly mentioned in the schedule annexed, and which are now in the warehouse of Reid, and are about to be placed in the Burlington Hotel.” Now reading this in connection with the schedule, there were goods in the schedule, but there were none which according to its language were then in Reid’s warehouse, and there were also goods in Reid’s warehouse which were about to be placed in the Burlington Hotel. As a fact however, many of the goods in the schedule were in the warehouse and not in the rooms they were represented to be in by the schedule, the full description then of the same goods being in the parlours and also in the warehouse cannot apply to any portion of the goods, for otherwise they must be in two places at the same time ; but this description does apply if it describe these goods as being some of them in the parlours and some of them in the warehouse. The mortgage therefore must, to give it full effect, be read as divisible in the granting part ; granting the goods which are in the schedule, and granting also the goods which are in the warehouse, and as it is capable of this latter construction, I think it may be explained and so interpreted by the evidence.

So far I have been assuming that the schedule does “contain such sufficient and full description of the goods and chattels that the same may be thereby readily and easily known and distinguished.” But the question is, does it contain such description or not ? In *Fraser v. The Bank of Toronto*, before referred to, the Court of Queen’s Bench decided that the words “household furniture in J. E. W.’s residence, was a sufficient description under the statute to pass the property, and the court also held that the property of a co-mortgagor was sufficiently described by the

words "household property and furniture of J. R. M." Both descriptions being accompanied with a list of the items of property in detail, and stating certain rooms in which they were placed, although these rooms in J. R. M.'s case were not represented to be in any particular house or place. The court holding as to this last described property, that the word "household" might be understood without any unwarrantable stretch of construction as referring to the residence of the party. The *Chief Justice* in that case also says, "we have conferred with the judges of the Common Pleas who have this precise question before them, and considering that the schedule specifies the several apartments in which the furniture was, we think we may assume that this schedule refers, like the other, to the party's dwelling house."

In the same court it was also decided in the case of *Moffatt v. Coulson*, before mentioned, that a mortgage granting "two horses," but "without stating anything as to age, colour or marks, or where they were to be found or how they were to be distinguished from any other two horses in the country," was not a sufficient description of the property within the statute.

In this court in the case of *Powell v. The Bank of Upper Canada*, also before mentioned, the mortgage granted the goods, chattels, furniture, and household stuff, expressed in the schedule annexed. The schedule contained a heading of "drawing room, dining room, and library," and then gave the details of goods in each of these rooms, and it there described a variety of items under the heads of "jewellery, silver," &c.

There was no direct statement that the goods were in the dwelling house of the mortgagor, or in any other named house; the mortgagor, however, was described as "of the city of Toronto."

The *Chief Justice* expressed the like view as the *Queen's Bench* had done, with respect to the effect of the words "household stuff," that they applied to the dwelling house of the mortgagor, and covered all the goods mentioned excepting the jewellery; and as to that, that there being "a list with a descriptive statement of material, or of the nature of the article, or of the object for which it is designated,

conceived in general terms, and yet particular enough to facilitate identification, coupled with the allegation that they were the property of the debtor, and were in his possession," was a sufficient description within the meaning of the Statute.

The other judges of the court concurred in the decision only in consequence of the previous decision of the Court of Queen's Bench above mentioned; which is somewhat singular, and perhaps shows some misapprehension on the part of the then learned Chief Justice of that court, in his conference with the Judges of the Common Pleas, in assuming, as he seems to do, that they quite concurred with him in the opinion which he afterwards expressed; for these two judges do not assent to the construction of the act being in accordance with their opinions; but rather the contrary, for they appear to have thought that they were constrained to adopt it in consequence of the previous judgment of the Queen's Bench.

In this particular case, the mortgagors are described as "of the city of Hamilton, in the county of Wentworth, hotel-keepers;" they grant precisely in the same words as in the case in 11 C. P. 303, "all and singular the goods, chattels, furniture, household stuff and articles," having adopted, as is very probable, the like printed form of mortgage for the purpose. This mortgage also contains an engagement by the mortgagors, that in case of default, or in case of their attempting to sell or dispose of, or in any way to part *with the possession* of the goods, or any of them, or to remove them out of the county, without the consent of the mortgagee, he may take possession of the same. This mortgage, as before stated, grants all the goods, &c., mentioned in the schedule, and which are now in the warehouse of Reid, in Hamilton, and are about to be placed in the *Burlington Hotel*.

From this it might perhaps be inferred that as the mortgagors are described as "of Hamilton,—hotel keepers," that their hotel was in Hamilton, and that *that* hotel was the *Burlington Hotel*; but this is not altogether so in fact, for although their hotel was in Hamilton, the hotel which they then kept was *not* the *Burlington* but the *American Hotel*,

as the case shews, although they had then taken the Burlington Hotel, and had possession of it, and had placed some of their goods in it, and intended moving into it very shortly which they afterwards did.

Most of the goods which were not in Reid's warehouse, were in and about the American Hotel, but not the whole of them, for the case finds "as regards the carpets, &c., the plaintiff has not shewn where they were at the date of the mortgage, nor what particular goods were intended to be comprised therein, but Clough & Jones, at the date of the mortgage, had and owned carpets, sheets, counterpanes and pillow cases both in the Burlington and in the American hotels in greater numbers in all than the quantities mentioned in the mortgage schedule." Here then is a case where the mortgagors have *two* hotels, part of the goods being in one and part of them in the other. Is there any reason then as they are described as "of Hamilton," and as "hotel keepers," and they have *two* hotels in Hamilton, the goods should not be held under the words "household stuff," to be the goods coming under that description, which are in the *two* houses, in like manner as they would be held to be such goods under the decisions before referred to if there had been only *one* hotel or dwelling house instead of *two* places? I think not. There may happen to be some confusion or difficulty in such a case in determining whether "dining room, &c.," if used as a matter of description of locality is the dining room in one house or the dining room in the other; but perhaps "dining room" might be held to be a generic term and applicable to all rooms of that nature, or the difficulty might be avoided if the words were "dining rooms," so as expressly to describe more than one room, but there may be no difficulty where, as in this case, rooms are described as parlours H. C. D. B., which are only in one house and not in the other. That there *may* be a difficulty in properly distinguishing the goods by a description of locality can be no reason why such a grant may not be perfectly good so long as it is free from such a doubt. I cannot therefore say that the description of these goods, as in certain rooms, which happen to be in one of two houses which the mortgagors had at the time of their grant, is not a valid grant, and a full and

sufficient description of the goods according to the decisions before mentioned. Nor can I say that one omnibus, one bay horse, one bay mare, one sorrel mare, one white faced bay horse, one white faced bay mare, &c., &c., where no locality is stated at all, as to such articles, is not a full and sufficient description according to the same authorities.

What shall be a compliance with the statute, a sufficient and full description of goods, that the same may be thereby readily and easily known and distinguished, may not be as easily determined as the legislature may have thought it should be by the language which has been used. A grant is good at law of all the grantors goods and chattels without any other or further description, Shep. Touch. 97. So also is a grant of all his goods in a particular place without any other description, Shep Touch. 98; England v. Downs, 9 L. J. N. S. Chy. 313. A bequest of the testator's goods and chattels will pass all his personal estate without more, and the writ of *fieri facias* against the goods and chattels of a debtor is general. that the sheriff do levy of his "goods and chattels" without any other description or limitation. And in none of these cases is it suggested that the grantee, legatee, or the sheriff, has difficulty, or is supposed to have difficulty in procuring or seizing the goods so granted, bequeathed or directed, to be levied. Yet the statute certainly requires that something more than such a general description shall be given, for such a description would not enable the goods to be "thereby readily and easily known and distinguished." Such a description therefore as was or is sufficient in a grant for general purposes, is not such a description as will answer for the purposes of a grant under this statute, and it was perhaps to provide against the generality of the common law grants that this special statutory enactment was made. If the common law grant then will not afford a test of the sufficiency of this statutory description, will the action of trover afford such a test? In Taylor v. Wells, 2 Saund. 74 and notes, it is said that trover will lie for "two packs of flax," without setting out the weight or quantity; for "a library of books," without expressing what they are; and a variety of other instances are given, because such a description, it is said, is certain enough, if the jury can understand the goods

where damages only are to be recovered, and not the thing itself.

But trover, it seems, will not lie for taking "in a certain dwelling-house divers goods and chattels of the plaintiff, without stating what the nature of the goods taken was, as, a certain parcel of paper, &c. Pope v. Tillman, 7 Taunt. 642; see also the form given in the C. L. P. Act, sched. B. No. 24, that the defendant "converted to his own use of the plaintiff's goods, that is to say, [*mentioning what articles, as, for instance, 'household furniture'*].

Now, this is somewhat more precise than is required to support a grant, for *the nature of the goods* must be stated; but still the statement is in the most general form, as, for instance, *household furniture*, from which the goods could not "thereby be readily and easily known and distinguished;" and therefore I conceive that the Statute is not satisfied by such a description being given of goods in a chattel mortgage, as would be sufficient to entitle a claimant to recover for their conversion in an action of trover.

In detinue, however, the description of the goods must be more precise than in trover; for the goods themselves are to be recovered; 2 Saund. 74^a, note (1); 74^b, same note; Ch. Plg. 7 Edn., 136.

Yet detinue for "a box of writings," is sufficient, without setting forth any writings in particular; Thornteton v. Bernard, 2 Ld. Ray, 992. So, it would seem, would a declaration for "a hundred sheep;" Bern v. Mattaire, Hardw. 110; S. C. 2, Str. 1019; for though the sheriff is to deliver the particular goods recovered by the plaintiff, he may require the goods to be shown to him before he makes delivery—*Ibid.*

In Atwood v. Ernest, 13 C. B. 881; the declaration was for certain books, papers, and documents of the plaintiff, that is to say: a purser's cost-book, a merchant's ledger, an invoice ledger; divers merchant's accounts, vouchers for payments to merchants, a banker's book, &c.

In Graham v. Gracie, 13 Q. B. 548, there was a count for detinue of a bill of exchange as follows, "a certain bill of exchange for £85." The date, the drawing the acceptance, and by whom drawn and accepted, the name of

the payee, and the time it was payable, having all been struck out at the trial by way of amendment, and Mr. Justice *Patteson* says:—"We think the declaration here was not made specially demurrable [by the amendment], but that it would have been enough simply to describe the bill as a bill of exchange for so many pounds."

This is not the way that instruments are usually described, as *Barton v. Gainer*, 3 H. & N. 387, the declaration was, that the defendants detained from the plaintiff's "two mortgages or deeds under the common seal of the Bristol and Exeter Railway, numbered respectively 1946 and 1948, each for securing repayment of the sum of £1000, &c., and also divers, to wit, eight coupons or interest warrants, to each of the said mortgages or deeds respectively annexed."

No doubt the rule is as it is laid down in 3 Bl. Com. 152: "In detinue, it is necessary to ascertain the thing detained in such a manner as that it may be specifically known and recovered; therefore it cannot be brought for money, corn, or the like, for that cannot be known from other money or corn, unless it be in a bag or sack, for then it may be distinguished and marked."

But while a hundred sheep,

A purser's cost book, &c.

A bill of exchange for so many pounds, are held to be such a description, by which these respective properties "may be specifically known and recovered," it is not quite easy to say why this same kind of description should not be held to be sufficient under our statute, when the object of specification is the same in both cases; and when in an action of detinue brought to recover the goods contained in a chattel mortgage, the description which would suffice to sustain the declaration in the action would, according to the rules of law, sufficiently identify the goods in the security. Now, this being so, it would seem to follow that whatever description in pleading which will enable goods and chattels to be specifically recovered by action, should also be sufficient to identify them for the purposes of mortgage or sale under the statute, for if they can be so specifically recovered by action it must be because such a descrip-

tion of them will enable them, in the language of Blackstone, to "be specifically known," or, in the words of our statute, to "be thereby readily and easily known and distinguished."

I should be inclined, then, to think that whatever would be an adequate description in an action of detinue, would also be a sufficient description of goods under this statute. If any other or more particular description be exacted, I fear it will be of no practical value. Suppose, for instance, in the case of *Powell v. The Bank of Upper Canada*, under the head of "drawing-room," one of the articles enumerated was *one piano*; what information would this give to any one, if the piano happened to be transferred to the *dining room*, or to a different house altogether? for it cannot be supposed that it was always to remain in its original drawing-room; *Jarman v. Woolloton*, 3 T. R. 622, per *Buller, J.*

Now a piano could be much more precisely described for the purposes of identification, than by attempting to do so by a mere statement of locality, when moveability is of the very nature of the article. It might be described as a *rose-wood* or *mahogany* piano; it might be further described as a *six-octave* or *seven-octave* piano. The maker's name might also be given, and the number of it, and no one can doubt that with such particulars added, the piano would be far more readily and easily known and distinguished than by simply specifying it as "one piano" in a drawing-room, while it need not remain in that drawing-room for one minute's time after the description of it has been given, and yet the latter kind of description has been clearly settled to be a sufficient description of it within our statute.

I do not think the giving or pretending to give locality to any chattel property is of the slightest value so far as third persons are concerned, but is only of consequence as between the parties themselves to settle beyond all question what particular goods it is the mortgagee or grantee is to take, for while description by locality is quite definite in such a case, it is utterly valueless as regards every one else unless the goods are always to be kept in the same place. There can be no pretence for saying that "one horse *in my barn*" gives any information to a stranger to the grant, six months after it has been made, what particular horse it was that was

then in the barn, and that was the subject of the grant, or that "one hundred sheep *in my field*" is any very precise identification to the sheriff, or to a creditor of the mortgagor, what particular sheep have been granted by the mortgage. In each case the grant might as well be of one horse or of one hundred sheep simply, without the addition of words, which to third persons mean nothing. Such a description would be sufficient in an action of detinue, and such a description is sufficient according to the practical result and effect of our own legal decisions.

It would be difficult to arrive at any other conclusion, for although a horse might be more particularly described than merely stating it as *one horse*, as its height and its colour might be given, its age too in some cases, and also some special marks which it might happen to bear, yet how could a person describe 100 sheep much more accurately, if at all, than by simply calling them 100 *sheep*? He might perhaps state what particular breed they were of, but, beyond this, whatever identity that would afford it would be difficult more specifically to describe them.

The statute does not require the best description to be given of the goods according to their nature that can reasonably be given of them, if it did then I should say the bill of exchange was not properly described in the case in 13 Q. B. 548, and that a horse or ox, or wagon, or piano, should have some other description than merely calling the articles by these names, but how plate, or china or glass, or earthenware, or chairs or tables, or articles of jewellery or carpets, and many other articles could be so specifically described that they could be readily know and distinguished by third parties it is not so easy to understand, and unless the statute can be given the fullest effect to in every case, there seems very little object in requiring the strictest particularity in one case and permitting the vaguest generality in every other case. I can form no other opinion then than that whatever description is sufficient for the recovery of goods in an action of detinue, will be a sufficient description of them also under the provisions of this statute.

I do not think, by this opinion, that I am departing from the terms and spirit of the act; and I think I am not exceed-

ing the decisions already pronounced by the courts ; but I am attempting to express a rule by which the statute may be interpreted according to some recognised standard and in conformity with the decisions of our courts.

The conclusion, then, to which I have come is :

1. That all the goods in the schedule which are described as having been in certain rooms, and which rooms are in either of the two hotels, do according to the cases of *Fraser v. The Bank of Toronto*, and *Powell v. The Bank of Upper Canada*, pass by the mortgage.

2. That all the goods which are described as having been in certain rooms and which were not in those rooms at that time, do not pass, because they do not come within the terms of the grant ; *Wood v. Rowcliffe*, 6 Exch. 407.

3. That all the goods which are described specifically as *one omnibus*, &c., &c., to which no locality at all is given, do pass under the mortgage, because the sufficiency of such a description is determined by the decisions before referred to, and because the description would be sufficient in an action of detinue.

4. That all the goods which were made at the time of the mortgage, and were the property of the mortgagors, in Reid's warehouse, do pass under the mortgage as a distinct grant from the goods which are specified in the schedule.

This disposes, I think, of all the goods but those lettered in schedule G, which are the goods that were ordered from Reid by Clough & Jones, but were not made and had not vested in them at the date of the mortgage. And as to these, I think, they also belong to the plaintiff not under the mortgage but by reason of their actual delivery to the plaintiff by Clough & Jones before they had been seized by the sheriff. The delivery to the plaintiff was made by only one of the debtors, and at a time when they were both insolvent.

There seems however, to be no objection to a delivery by one partner for and in respect of a partnership debt and for partnership purposes. There is no evidence of its having been made fraudulently. It seems indeed rather to have been made under the belief of all parties that it was covered by the mortgage, and it was delivered with the rest of the

property as strictly claimable by the defendant under the provisions of the deed.

The rule will therefore be drawn up for the parties accordingly.

The *Chief Justice* and *John Wilson, J.*, concurred.

Per cur.—Rule accordingly.

ROWE V. JARVIS.

Error and Appeal—Practice—C. S. U. C. c. 13.

No writ of error or appeal is required—Sec. 32 of the Act respecting the Court of Error and Appeal, which abolishes the writ, supersedes the orders of the Court of Appeal under which the writ was given, notwithstanding the provision in sec. 64, affirming the orders of the Court until altered.

After security has been allowed, under sec. 35, without objection by the respondent to the want of the proceedings required by secs. 33 and 34, the Court will not rescind the allowance of the security, and permit the respondent to proceed on his execution, on the ground of those proceedings not having been taken.

The neglect by the appellant to take the proceedings mentioned in secs. 36 and 37, is no ground for rescinding the allowance of the security.

In cases where judgment of *non pros.* is authorized by sec 39, it is not necessary to obtain leave of the Court to sign it.

The statute and orders of the Court of Appeal afford the respondent the means of pressing a case to a hearing.

In this case, judgment was entered for the plaintiff on 21st December last, on which execution was duly issued. On 18th December, a notice of appeal was served; the notice was to the effect that the defendants intended to appeal from the decision of this court, on the special case argued in the cause, to the Court of Error and Appeal.

On the 9th February, the defendant's attorney served a paper on plaintiff's attorney entitled in this court and cause stating the grounds of appeal; it was signed by Mr. Gamble and Mr. J. H. Cameron. This paper was afterwards taken away by Mr. Boulton, the partner of the defendant's attorney, who, on the 25th of February, served a notice of the grounds of appeal entitled in the Court of Error and Appeal, which were as follows:

First—That the action should have been against the appellant, for not having seized and sold the lands of James

Cotton, on the respondent's writs, and not for having made the money by the sale of the lands under the respondent's writs, and not paid over, but made a false return of "No lands."

Secondly—That the writs of the Bank of Upper Canada were, on the facts stated in the case, entitled to priority over the writs of the respondent.

Thirdly—That the withdrawal of the respondent's writs from the hands of the sheriff was an abandonment of them, and an admission that no seizure had taken place under them.

Fourthly—That on the facts stated in the case, the return of the appellant on the writs of the respondent, was correct in law and fact.

That on the 9th February, the defendant filed an appeal bond, with the Bank of Upper Canada as the security, in the office of the Clerk of the Crown and Pleas of this Court. It is stated that this bond was approved by the plaintiff's attorney and allowed by the Court.

Before the last sitting of the Court of Appeals, the plaintiff's attorney prepared appeal-books adding the plaintiff's reasons against the appeal, and set the same down for hearing at the last sittings of the Court of Error and Appeal, but that court decided they would not hear the appeal, (as the plaintiff's counsel understood,) on the ground that a respondent could not set down a case for hearing under the circumstances of this case, and ordered the appeal to be struck out of the list, with costs. The order of the Court of Appeals was served on 16th May last.

It was also stated that the grounds of appeal were filed with the registrar of the Court of Appeals on or before the 25th February last. It did not appear that anything further had been done in the case, in this court, than what is stated.

During the term, *C. S. Patterson* obtained a rule to show cause why the bond filed as a security in the cause should not be disallowed, and why the plaintiff should not be at liberty to issue and proceed with execution in this cause, notwithstanding the notice of appeal, and the allowance of the security on grounds that no memorandum alleging that there is error in law in the record and proceedings in this

cause, has been delivered to the clerk of the Crown of this court, pursuant to the 33rd section of the act respecting the Court of Error and Appeals, and that no such memorandum has been filed, nor has any notice thereof been served on the plaintiff or his attorney, pursuant to the 34th section of the said act.

That no suggestion has been entered on the judgment roll pursuant to the 36th and 37th sections of the said statute.

Or on the ground that no writ of error and appeal has been issued, to remove this case into the Court of Error and Appeal, nor has any proceeding been taken by the defendant to bring his appeal in this cause to a hearing, or why the plaintiff should not have leave to sign judgment of *non pros.* as to the said appeal on all or any of the said grounds.

During the term, *C. S. Patterson* moved his rule absolute, and *G. D. Boulton*, for defendant, shewed cause, and contended that the vice complained of was but an irregularity, and that defendant, having taken a step in the Court of Appeals, waived the irregularity; that the decision of the Court of Appeals shows that what defendant had done was regular. He contended that the costs ordered to be paid by plaintiff, by the Court of Appeals, not having been paid, he ought not to be allowed to make this application. He further urged, that as the cause is already before the Court of Appeals, the plaintiff was not at liberty to come here to move to stay proceedings in that court, or to take steps which will produce that effect. He contended that this was an appeal on a special case, and that the writ of error is abolished by sec. 32 of the act establishing the Court of Appeals; he further remarked that respondent had not filed his reasons against the appeal, as required by the rule. He referred to Rule 14 of the Court of Appeals, in 2 Grant's Chancery Reports; he also referred to sec. 22 of c. 13 Con. Stat. U. C.

Patterson, contra, argued that the Court of Appeals properly refused to hear the case, because the proceedings, the want of which are now complained of, had not been taken to bring the case properly before that court: but that in striking out the case, *with costs*, an order was made which that court had no process to enforce. In *Abbott v. Feary*, 6 H. & N.

113; S. C. 6 Jur. N. S. 1099, the appeal was dismissed, on the ground that the Exchequer Chamber had no jurisdiction; and costs were refused because the court had no jurisdiction. The reason for refusing costs is most distinctly stated in the *Jurist* report. Our Court of Appeals seems to act on a different principle; and has given costs in dismissing cases on grounds similar to those in *Abbott v. Feary*, as *e.g.* in *Coatsworth v. The City of Toronto*,* and *Van Brocklin v. The Town of Brantford*. But whether enforceable by the Court of Appeals or not, these costs are not costs of *this* court; and the non-payment of them is therefore no ground for refusing the relief now asked. He stated that the objection to the want of a writ of error was taken merely to meet a possible construction of sec. 64 of the act respecting the Court of Appeals (C. S. U. C. c. 13). Although sec. 32 enacts that a writ of error and appeal shall not be used, yet sec. 64, which gives the court power to frame rules, affirms, until altered, the existing rules, which give a writ of error, and regulated the proceedings under it. Assuming, however, that sec. 32 is to govern, he then contended that the abolition of the writ of error, which writ was the commencement of a *new cause* in the Court of Error, and the provision that the proceeding to appeal should be a step in the original cause, superseded all the orders of the Court of Appeals regulating the proceedings in a cause in Error. That the Court of Appeals had not possession of the cause until it came up, as provided by the statute, all the preliminary proceedings being now in the court below, and being governed by the statute. He referred to (Day's C. C. P. Acts, note on s. 148 of C. L. P. Act of 1852, and observation of Lord *Westbury* as to the meaning of "a step in the cause," in *Attorney General v. Sillem* [the *Alexandra* case], 10 Jur. N. S. 446); and he urged that the present, being on a special case, was properly a case *in Error*, not *in Appeal*: that although s. 22 of our statute differs from s. 34 of the English C. L. P. Act of 1854, by using the word "appeal" in place of "error," yet it agrees with the English act in enacting that the proceedings shall be the same as on a special verdict, and these are proceedings *in Error*. That ss. 42, 43, 44 and 45 of our statute, corresponding with ss.

* Decided in Appeal in July, 1859, but not reported.

39, and other sections of the English C. L. P. Act, 1854, and giving the practice in cases of appeal, are not applicable to a case like the present. That this case comes under ss. 33 to 39, which regulate the practice in cases of error; that defendant, not having complied with the provisions of ss. 33 and 34, has done nothing towards bringing the case into the Court of Error. That, therefore, the plaintiff should be at liberty to proceed with his execution, which he cannot do, without first setting aside the appeal bond, or the allowance of it. That if the bond is permitted to stand, he should still have leave to sign judgment of *non pros.* under sec. 39. Grant v. The G. R. W. R. Co. 8 U. C. C. P. 343, was also referred to.

Boulton, in reply, urged that there was no time limited for taking the subsequent steps. That the bond being filed stayed plaintiff's proceedings. If plaintiff had any objections to urge to the steps that were taken by defendants to get the cause into the Court of Appeals, he should have made them before the bond was approved: not having done so, he is now too late.

RICHARDS, C. J.—I do not think that under the 64th sec. of the Con. Stat. of Canada the legislature intended to restore the writ of error in civil cases, which by the 32nd section of the same act had been expressly abolished, merely because they provided that the present rules of the court of Error and Appeals should continue in force until altered. Under the 38th sec. of 20 Vic. cap. 5, though the practice of issuing the writ of error and appeal was abolished by that act, yet the then existing rules and practice and mode of proceeding in the Court of Appeals were continued "except so far as changed, modified and superseded" by the provisions of that act. The effect of this section was virtually to rescind such portions of the rules of the Court of Appeals as were contrary to that act, and when the consolidation of the statutes took place (all the enactments being strictly construed and effect given to them) those portions only of the rules that were not contrary to the Stat. 20 Vic., cap. 5 were the *then* "present rules" of the court in force when the Consolidated Act was passed.

I cannot say that I have any doubt that the Con. Stat.

and rules of court must be construed in *pari materia*, and effect given to both so as to make them harmonize; and I think as to the writ of appeal it is abolished by the statute, and is not now necessary to bring a case before the Court of Appeals.

In *Grant v. The Great Western Railway*, 8 U.C. C.P. 343, an application somewhat like this was made to this court and refused, because it appeared that under the statute and rules of the court of appeal the respondent always had the power of pressing a case on when it was unreasonably delayed.

With regard to the want of the memorandum required by the 33rd section or the omission of the service thereof required by the 34th section, it appears from the 35th section that these ought to precede the allowance of the security, for the proviso to that section adds, that if the grounds of error or appeal appear to be fictitious the court or a judge thereof may order execution to issue or to be proceeded with. These proceedings, being the initiatory ones to the appeal, must naturally precede the allowance of the security. If therefore a party wishes to object to any of these initiatory proceedings, I think he ought to do so before the security is "allowed." The tenth rule of the Court of Appeals requires fourteen days' notice of the application for the allowance of the security to be given to the opposite party so that he has ample notice of what is going on, and if he does not then take steps to have all the prior proceedings regular, or object to such as are irregular, I do not think he can properly be allowed to do so afterwards in this form.

It seems to me that omitting to take the steps presented by the 36th and 37th sections is no ground for our disallowing the security. If under the 39th section this omission authorises the respondent to sign a judgment of *non pros*, he does not require the leave of the court to do so. If it is not a ground for such a judgment, and the respondent is prejudiced by appellant's delay, I think he may get relief under the rules of the Court of Appeals.

As to the want of a writ of appeal, I think that writ is abolished by the statute. As to signing judgment of *non*

pros, if the statute authorises it plaintiff does not require the order of the court for that purpose, and if it does not authorise it we ought not to grant it. As at present advised I do not feel that we are called upon properly to decide the question at present, whether plaintiff has a right to a judgment of *non pros* or not.

As already intimated, I think the statute and rules of the Court of Appeals afford the appellant himself the means of getting the case to a hearing in the Court of Appeals or having the appeal dismissed. Up to this time he does not appear to have availed himself of those means, and I do not think he is in a position to invoke the aid of this court to assist him in the manner sought for in the rule.

The rule must therefore be discharged with costs.

Per cur.—Rule discharged.

WOOD ET AL. V. YOUNG.

Account Stated—Promissory Note—Evidence—Exchange on New York.

In an action on an account stated to recover the sum of \$1,040 23, with the current rate of exchange thereon on New York. The plaintiff offered as evidence of the debt an instrument in the following form:—

NEW YORK, January 28th, 1861.

\$1,040 23.

Thirty-two months after date I promise to pay to the order of myself ten hundred and forty-two dollars twenty-three cents at the Bank of Upper Canada, Toronto, C. W., with the current rate of Exchange on New York. Value received.

This was signed and endorsed by the defendant.

Held—That the production of the instrument was *prima facie* evidence of an account stated between the parties, and the instrument being a promise to pay the amount claimed, with the current rate of exchange on New York, in Toronto, at its maturity, the amount thereof was payable in Canada money.

The writ in this cause was issued on the 3rd November, 1863. The declaration is on the common counts for goods sold and delivered, goods bargained and sold, work done and materials provided, money lent, money paid, money had and received, interest, and for money found to be due from the defendant to plaintiff on an account stated between them.

The defendant pleaded:—1. Never indebted. 2. Payment.

The cause was taken down to trial at the last Winter Assizes for the United Counties of York and Peel, before *Hagarty*, J. An instrument, of which the following is a copy, was put in evidence at the trial :

New York, January 28th, 1861.

\$1040 23.

Thirty-two months after date, I promise to pay to the order of myself, ten hundred and forty $\frac{23}{100}$ dollars, at the Bank of Upper Canada, Toronto, C. W., with the current rate of exchange on New York. Value received.

(Signed) J. YOUNG.

Endorsed (Signed) J. YOUNG.

The signature of defendant to the instrument was admitted. The plaintiffs claimed the face of the note, and interest, and it was only offered as evidence on the common counts.

For the defendant, it was objected that plaintiffs could only recover an amount equivalent to what would purchase a draft on New York payable there for the face of the note, at the date it matured. He also objected that the document produced did not prove an account stated ; that the amount was left open and the contract was fluctuating until the rate of exchange was determined.

Evidence was offered to show, that when a note is made in New York, and payable in Toronto, that brokers here take the equivalent in Canadian money sufficient to purchase a draft on New York for the amount of the note. On the first of October, 1863, bills on New York were at $27\frac{1}{2}$ per cent. discount. To pay in gold at that day, in New York, 1 per cent. premium would have been required.

A non-suit was moved for, when it was agreed that defendant should have leave to move to enter a non-suit, or to reduce the verdict to \$767 51, being the amount of the note, less $27\frac{1}{2}$ per cent. discount. A verdict was entered for plaintiff for the face of the note and the interest thereon at six per cent. per annum.

In Hilary Term last, *Proudfoot*, pursuant to leave reserved, moved to enter a non-suit, on the following grounds :

1. There was no evidence at the trial of an account stated between the parties, as the contract sued upon, without evi-

dence of the rate of exchange, does not fix any settled amount in respect of which plaintiffs are entitled to recover ;

2. Or, to reduce the verdict to the sum of \$767 $\frac{51}{100}$, or such other sum as the evidence for the defence show plaintiff entitled to, at the time of the maturity of the contract, according to the then current rate of exchange on New York ;

3. Or, for a new trial, on the ground of misdirection, in directing a verdict for the plaintiffs, instead of leaving it to the jury to say, what the meaning of the contract sued on was, and to allow the jury to consider the current rate of exchange on New York, at the maturity of the contract, in determining the amount for which plaintiff was entitled to recover.

During the term, *Bell*, Q. C., shewed cause, and contended that the instrument produced was a promissory note payable to bearer, and that the case of *Pollard v. Herries*, 3 B. & P. 335, had not been brought to the notice of this court, when *Palmer v. Fahnestock*, 9 U. C. C. P. 172, was considered. He further urged, that if the instrument was not a promissory note, it was evidence to go to the jury on the account stated, and if so, it shewed that at the time of the accounting, the defendant owed the plaintiffs the amount therein mentioned, and agreed to pay it in Toronto, thirty-two months after the 28th January, 1861 (the date of the instrument), and in addition to pay the current rate of exchange on New York ; that the money being payable in Toronto, the value of the money here is what must regulate the amount to be paid ; and there being no evidence that at the time of the accounting, the money was worth any less in New York than it is here now, there is no pretence for reducing the amount of the verdict. He referred to *Davies v. Wilkinson*, 10 A. & E. 98 ; *Knapp's Privy Council Cases*, vol. 2, p. 18 to 21.

Harrison, contra, contended that the case in this court reported in 9 C. P., had been followed in the Court of Queen's Bench, vol. 20, p. 307, between the same parties, and would not be disturbed, and therefore the instrument could not be considered a promissory note. Then, as to its being evidence under the account stated, the amount

under the account stated, ought to be certain, and ought to be money payable on request. He contended, the amount being to pay with current rate of exchange on New York, made it uncertain what was to pay, and there was nothing before the court to shew any amount that was payable on request.

He also argued that the effect of the instrument was to pay according to the rate of exchange on New York, or in exchange on New York, and in this view, the verdict ought to be reduced according to the evidence. He further argued, that the instrument was in effect a note payable to the bearer, and that in the absence of any evidence of dealings between the parties, a promissory note payable to the bearer was not evidence under the account stated without showing that it was delivered to the plaintiff.

RICHARDS, C. J.—Wood v. Mytton, 10 Q. B. 805 ; Brown v. De Winton, 6 C. B. 336 ; Hooper v. Williams, 2 Ex. 13 ; Masters v. Baretto, 8 C. B. 435 ; and, I believe some subsequent cases, establish that an instrument in the form of a promissory note payable to the order of the maker, and endorsed and put into circulation by him, may be sued on by a subsequent holder as a promissory note payable to the bearer.

Curtis v. Rickards, 1 M. & G. 46, is an authority that the production of an I. O. U. signed by the defendant, is evidence of an account stated between the parties, and the production of the instrument is also *prima facie* evidence that it was delivered by defendant to the plaintiff. If it had been delivered to any other person, defendant might call such person to prove it.

The legal effect of the instrument, as set out in the declaration, seems to me to be this : for value received from the person to whom I shall deliver this after it is endorsed, I promise to pay him, or the bearer hereof for the time being, the money mentioned in this instrument. If it had been shewn by express evidence that defendant had delivered the instrument to the plaintiffs, I have no doubt it would be evidence of an account stated between them.

Then, is not the production of the instrument some

evidence that it was delivered by the defendant to the plaintiffs? If not, how did he get it. There is nothing to contradict the presumption on the instrument itself, or from anything that occurred at the trial; on the contrary, the instrument shews that the persons who endorsed the document next after the defendant, are the plaintiffs. The observations of the judges in *Curtis v. Rickards* quite sustain this view. The common case of a letter being produced in evidence, with the direction torn off, being *prima facie* evidence that it was addressed to the party who produced it, is given as an illustration in that case. They also remark that if the defendant had delivered the instrument to any other person, he could have proved that at the trial. The objection that the defendant might not know that such an instrument would be given in evidence at the trial against him, and that he could not be prepared to meet it, is remarked upon by *Erskine, J.*, who said as to that, "but in moving for a new trial, he might have come with affidavits shewing that the memorandum had been in the hands of other parties."

Without in any way expressing an opinion against the correctness of the judgment of this court in *Palmer v. Fahnestock*, which, as at present advised, I personally am not disposed to dispute; the instrument having been produced, placed before the court and jury, having been signed by the defendant, and also endorsed by him, and having been produced by the plaintiffs, I think all this being shewn at the trial, is evidence to go to the jury of an account stated between the parties, though the instrument may not be a promissory note under the Statute of Anne. In addition to other cases to be noted on this subject, I would refer to the case of *Tyke v. Cosford*, 14 U. C. C. P. 64, decided in this court last term, where my brother *Wilson* refers to some of the cases that shew what is sufficient evidence to go to the jury on the account stated. The defendant would of course have been at liberty to have shewn on the trial that the instrument was not delivered by him to the plaintiffs, or that it was not on an account stated between them, but on a transaction out of which an account stated could not have arisen.

In my view, the rate of exchange between Toronto and New York does not necessarily have anything to do with the

question, whether the instrument admits that on the day it was made, and endorsed, and delivered to the plaintiffs, the defendant was indebted to them in the sum of one thousand and forty $\frac{2}{10}\frac{3}{100}$ dollars or not. It affects the question how he was to pay that sum so admitted to be due, and by the instrument, he was to pay it thirty-two months after date, in the city of Toronto, (together) with the current rate of exchange on New York.

I think the words "with the current rate of exchange" imply that something more was to be paid than simply the amount mentioned in the instrument: certainly not less. The promise is absolute and unconditional to pay at the bank, in Toronto, ten hundred and forty $\frac{2}{10}\frac{3}{100}$ dollars. I can not see how the additional words can make the sum to be paid any less. It is true when a bill of exchange is payable in a foreign country, and is dishonoured, the holder can only recover from the *drawer* the amount of the *reëxchange* at the time the bill becomes due, whether that happens to be more or less than the amount paid for the bill by the holder. By the contract, the drawer undertakes that the acceptor will on maturity pay the amount of money mentioned in the bill, at the place where it matures, at the time it becomes due; all that the holder, if residing in England, can claim, is so much English money as would, at the place where the bill was payable, purchase the required amount of foreign money at the actual rate of exchange on the day of dishonour, and the interest and expenses of the transaction, which is called in England *reëxchange*. It may be argued that to give entire effect to the instrument, as an agreement, it might be held that in addition to the amount agreed to be paid, the defendant should pay what further sum might be necessary to place in New York for the use of the plaintiffs the money so to be paid into the bank here; and if \$1000 in Canada money was worth \$1750 in New York, that the defendant, in addition to paying the \$1000 in Canada money (if that was what was to be paid by agreement), should pay whatever might be necessary to place that \$1000 or its value in New York. Looking at the date of the transaction, and the circumstances surrounding it, I do not think that the state of facts which actually existed at the time the money mentioned in the

instrument became payable was ever in the contemplation of the parties. Prior to that time the value of money in New York was generally greater than it was in Canada, and it was undoubtedly the intention of the parties that in addition to paying the money mentioned in the instrument, that the defendant should also pay the expenses of buying the bill on New York with the money, so that the holder of the instrument should not lose the cost of purchasing the bill and probably the difference, if any, in the value of money between the two places.

On the whole, I think, there was evidence to go to the jury on the account stated, and therefore we cannot order a nonsuit. As to the value of the money referred to in the instrument, the place where it was payable being in Canada, and there being no evidence to shew that the money acknowledged to be due by it at the time it was dated and delivered to the plaintiffs was of any less value than Canada money, for which value the verdict is rendered, I see no ground on which we can properly interfere to reduce the verdict.

The rule will therefore be discharged.

ADAM WILSON, J.—I think the instrument declared on is a promissory note, but it is not of necessity that this should be decided, for the plaintiff has not declared upon it as a note, but claims to recover the amount of it under the account stated.

The instrument is signed by the defendant payable to his own order, and endorsed by him in blank, and it is payable with the current rate of exchange in New York.

The authorities shew that an instrument payable to the makers own order is, when it is endorsed by him, to be treated as an instrument made payable to the bearer generally. Can such an instrument be treated as evidence of an account stated? I think it can. It is quite well settled that an I O U may be given in evidence under the account stated. *Curtis v. Rickards*, 1 M. & G. 46; *Fesenmayer v. Adcock*, 16 M. & W. 449, and *Wilson v. Wilson*, 14 C. B. 616. Because U is presumed to represent the person who is the holder of the instrument; but if the holder be not in reality the person who received the instrument directly from the maker, he will not

on proof of this be held entitled to recover upon the account stated, for the *prima facie* right from the possession of the instrument is disproved. *Curtis v. Rickards*, 1 M. & G. 46. The same presumption, I think, arises upon the production of a note payable to the bearer, or on the production by the holder of a note or bill endorsed in blank as against the last endorser, for the holder is then the bearer and apparently derives title immediately from the endorser—(*Early v. Bowman*, 1 B. & Ad. 889; *Wells v. Girling*, Gow. 22 notes; *Burmester v. Hogarth*, 11 M. & W. 97; *Lewin v. Edwards*, 9 M. & W. 720)—and it may in like manner be disproved.

The same reasoning precisely which is in favour of the I O U is quite as strongly in favour of the instrument payable either in fact or in law to bearer, and it does not appear that the note of the reporter at the foot of page 46 in *Curtis v. Rickards*, that an instrument "I owe the bearer" is not evidence of an account stated with the holder of it, is at all supported, certainly not by the case referred to in 1 B. & Ad. 889, and it is directly opposed to the two cases above quoted in 9 M. & W. 720, and 11 M. & W. 97. If, however, there is no privity between the parties, as between endorsee and drawer, the endorsee may recover on the account stated against the drawer on proving a *special* promise to pay. *Oliver v. Dovatt*, 2 M. & Rob. 230.

I am of opinion then the plaintiff is entitled to recover, upon the account stated, the full amount of this note with the rate of exchange on New York at the time when the note became due, because it does not appear the plaintiff was not the holder or bearer of the instrument, and in the absence of such proof it must be presumed that he was.

Per cur.—Rule discharged.

IN RE. TREMAYNE, AN ATTORNEY.

Attorney—Roll of court—Striking off of.

A certificate of the clerk of the court in which an attorney has been struck off the rolls, and on which an application under the rule of court is made to another court, to have the attorney struck off the rolls of that court, should shew the grounds on which he was struck off the rolls of the court from

which the certificate was granted. The application should also be for a rule to shew cause and should not be moved for on the last day of term.

On the last day of the term, *McGregor* produced a certificate, signed by the clerk of the Crown and Pleas of the Court of Queen's Bench, (and verified by the seal of the court,) stating that an attorney, on the twenty-seventh day of May, 1864, had, by order of the Court of Queen's Bench, been struck off the roll of attornies of that court. On this he moved that the said attorney be struck off the rolls of this court.

The rule of Queen's Bench on the subject referred to in Draper's Rules, p. 8, provides, "that whenever an attorney shall be struck off the roll of attornies by order of the court, the clerk shall forthwith certify such dismissal and the grounds thereof expressed in general terms under the seal of the court, and the court on any similar certificate from the Court of Chancery or the Court of Common Pleas, of any attorney or solicitor of either of the said courts respectively, having been struck off the roll of such court, shall thereupon take proceedings for striking such person, being an attorney of this court, from the roll of attorneys, according to the course and practice and in like manner, and under like circumstances observed in similar cases in the superior courts in England." A similar rule exists in this court.

RICHARDS, C. J.—I do not think we can grant the rule sought for on the materials now before us, nor without granting a rule *nisi*. The certificate produced on the motion does not express the grounds of the dismissal of the attorney as required by the rule of court, which would seem to be fatal to the application now made.

The practice in England, as I understand it, before the passing of Imperial Statute 23 & 24 Vic., cap. 127, and which existed when our rule of court was made, was to have a rule *nisi* issued in the first instance and served on the attorney before striking him off the roll, though his name might have been removed from the roll of attornies of another court. The case *In re. ———*, gent, one, &c., reported in 1 Ex. 453, Michaelmas Term, 1847, decides expressly that the motion should not be made the last day of term, and inferentially

that the rule should be to shew cause. *Alderson, B.*, said, "this is the last day of term, he ought to have the opportunity of denying that he is the same person." *Pollock, C. B.*, said, "this is the last day of term and the matter would hang over his head during the whole of the vacation. The motion should be made so as to give him an opportunity of answering it promptly."

It is true that In re. John Collins, reported in Easter Term, 1856, 18 C. B. 272, the Court of Common Pleas struck an attorney off the roll of that court on the production of a rule of the Court of Queen's Bench, shewing he had been struck off the roll of that court for misconduct. *Jervis, C. J.*, said, "out of deference to that court we do not enquire into the circumstances upon which they acted. The rule may go."

The case of In re. Hall, 2 Jur. N. S. 1233, seems to be an authority, that the Queen's Bench in England, so late as Michaelmas Term, 1857, held that the rule to strike the attorney off the roll should be on a rule to show cause, and the case of In re. Sill, of the same volume, p. 1232, shews that when an attorney has been reädmittid in the court in which the initiative had been taken for striking him off the roll, the rule to reädmitt him in another court must be a rule *nisi*.

The 25th section of the Imperial statute, passed 28th August, 1860, to which I have referred, provides that the name of every person who shall be struck off the roll of attorneys of any of the superior courts of law at Westminster, by the rule of any such courts, or off the roll of solicitors of the Court of Chancery, by order of any judge of that court, shall, upon production of an office copy of such rule or order, and an affidavit of the identity of the person named therein, to the proper officer of every or any other of the said courts of which such person is an attorney or solicitor, be struck off the roll of such court; and when restored to the roll of the court from which he was first struck off, on production of the rule or order restoring him, with a similar affidavit of identity to the proper officer, his name shall be restored to the roll of the other courts.

Notwithstanding this enactment, the Court of Queen's Bench in England, in the case of In re. De Medina, one, &c.,

6 L. Times, N. S. p. 536, 17 June, 1862, when an attorney had been suspended from practice, by a rule of the Court of Exchequer, determined that they would look into the affidavits and exercise their discretion about suspending him from practice in that court.

In the case before us, the application must fail, as the certificate from the Court of Queen's Bench does not shew the grounds of the dismissal of the party applied against in that court, as required by the rule of court; as well as on the ground that the application was made on the last day of term, and is for a rule absolute in the first instance. *Adam Wilson, J., and J. Wilson, J., concurred.*

Per cur.—Rule refused.

JOSLIN V. JEFFERSON.

Lease—Rent.

A. by deed conveyed by way of lease certain lands to B. *Habendum*—To have and to hold the said premises unto the lessee, for and during and unto the full end and term of ten years, to be computed from the first day of January, 1863, and from thenceforth ensuing. *Reddendum*—Yielding and paying therefor yearly during the said term, unto the said lessor, his heirs and assigns, the clear yearly rent or sum of \$720, without any deduction whatsoever, the first payment to begin and be made, on the first day of January, 1863, next ensuing from the date of these presents.

Covenant by lessee that he would at all times during the continuance of the term, well and truly pay to the lessor the said yearly rent, on the day and time as was therein before limited and appointed for payment thereof.

Held—That the second year's rent became due and payable on the first day of January, A. D. 1864.

Writ issued on 2nd January, 1864. Declaration stated that plaintiff had by deed leased to the defendant two hundred acres of land, for ten years from the first day of January, 1863, at the yearly rent of \$720, and the defendant by the deed covenanted with the plaintiff to pay him the said rent as aforesaid, and although the sum of \$720, rent became due on the 1st January last, the defendant did not pay the same, and the said rent is still due and unpaid. Plaintiff claimed \$1000.

The defendant pleaded that no part of the said rent had at the commencement of the suit, become due as alleged, on which issue was joined.

The cause was taken down to trial at the last assizes for the counties of Huron and Bruce, held before *Morrison, J.*

The lease between the parties was put in. It was dated on the 27th September, 1862, and made between the plaintiff, thereafter called the lessor, of the one part, and the defendant, thereafter designated as the lessee, of the other part; whereby the lessor demised and leased to the lessee Lots No. 22 and 23, in the first concession of the township of Stanley, in the county of Huron; to have and to hold the said premises, &c., unto the lessee for and during and unto the full end and term of ten years, to be computed from the first day of January, 1863, and from thenceforth ensuing and fully to be complete and ended, &c.; yielding and paying yearly during the said term, unto the said lessor, his heirs and assigns, the clear yearly rent or sum of \$720, without any deductions whatsoever, the first payment thereof to begin and be made on the first day of January, (one thousand eight hundred and sixty-three), next ensuing from the date of these presents; and the lessee covenanted with the lessor, that he the lessee should and would from time to time, and at all times during the continuance of the term, well and truly pay to the lessor the said yearly rent, on the day and time as was therein-before limited and appointed for payment thereof.

It was admitted that the defendant had paid the first year's rent on the first day of January, 1863.

The defendant contended that the second year's rent did not become due until the first day of January, 1865, which was in fact the end of the second year of the term; that the payment of the first year's rent only was accelerated by the terms of the lease.

It was agreed that a verdict should be entered for the defendant, with leave to plaintiff to move to enter a verdict for him for \$736 $\frac{57}{100}$, if the court should be of opinion that the plaintiff was entitled under the terms of his lease, to recover the second year's rent under this action.

This Term *R. A. Harrison* moved to enter the verdict

for plaintiff for \$736 $\frac{57}{100}$, pursuant to leave reserved, upon the ground that on the construction of the lease proved at the trial, plaintiff was in law entitled to recover the amount in this action.

During the term, *O'Connor* shewed cause, and contended that plaintiff was not entitled to recover for the second year's rent until the 1st January 1865; that the lease does not profess to make the rent payable in advance; that the very nature of rent, being a return for the use of the premises implies that it is only payable after the premises have been enjoyed, and the presumption always is that it is not due until there has been such enjoyment. That the effect of the lease is only to make the first year's rent payable in advance. He referred to *Holland v. Palser*, 2 Starkie, 162, as an authority fully sustaining his views, and to *Woodfall's Landlord and Tenant*, ed. of 1863, p. 322.

Harrison, contra.—By the terms of the lease, there are ten yearly payments to be made during the term, if the lease would expire on the 31st December, 1872, as he contended it would; then the payment of the last year's rent, according to the view contended for by defendant, would be after the expiration of the term, to wit, on 1st January, 1873; that the first payment regulates what is to follow; that being made on 1st January, 1863, the next must be made on 1st January, 1864, or there would be no payment in 1864, and consequently no paying *yearly* during that year of the term, which is contrary to the *reddendum*, which says, yielding and *paying yearly during the said term*, unto the lessor, the clear yearly rent or sum of \$720, the *first payment to begin* and be made on 1st January next.

He contended that the case in Starkie was only a *nisi prius* decision, and that Lord Ellenborough gave leave to move against his opinion; though it did not appear to have been moved against, it ought not to be considered a binding authority; that the rent in *Holland v. Palser* was a yearly rent of £80, the rent to commence at Michaelmas, and to be paid three months in advance, such advance of £20 to be paid on taking possession; that this was different from the case under

consideration ; in that case, the advance might be reasonably held to be of the first twenty pounds, but here it was the construction of the agreement as to the payment of the rent within each year, and it could not be carried out unless the payments were made in each year on the 1st of January.

He argued that this must be construed as any other covenant for the payment of money, and if it had been to pay \$720 yearly for 10 years, the first payment to be made 1st January, the next and all the subsequent yearly payments would be held to mature on each 1st January thereafter. He referred to *McAnnany v. Tickell*, 23 U. C. Q. B. 122 ; *Archbold on Landlord and Tenant*, 2nd ed. 33 and 34 ; and to *Hopkins v. Helmore*, 8 A. & E. 463.

RICHARDS, C. J.—The facts of the case of *Holland v. Palser*, referred to by Mr. *O'Connor*, were as follows : The action was brought to recover a quarter's rent of a house. By the terms of the agreement the house was let for twelve calendar months at the yearly rent of £80. The rent to commence at Michaelmas, and to be paid three months in advance, such advance of £20 to be paid on taking possession. Two quarter's rent had been paid and the third quarter had not expired when the action was brought. The question was, whether under the terms of the agreement the rent for the third quarter had accrued at the commencement of the quarter before the action was brought. Lord *Ellenborough* held that if it had been intended, under the agreement, that each succeeding quarter's rent should be paid in advance, it would have been very easy to have said always paid in advance. The plaintiff was nonsuited, leave being given to move against it, but no motion was ever made. His lordship held that the stipulation for the advance applied to the first quarter's rent only.

According to the statement of the case, as reported, it does not appear that under the agreement the rent was ever to be paid quarterly. By statement the house was let for twelve months, at the yearly rent of £80, to commence at Michaelmas, and to be paid three months in advance, such advance of £20 to be paid on taking possession. There may certainly be room to argue that this advance only applied to the first

quarter. In *Hutchins v. Scott*, 2 M. & W. 809, a lease was dated 8th of September, 1855, the premises under it were let for seven years from that date at a yearly rent of £42, payable quarterly; the first payment to be made on the 25th of March then next following. For the landlord it was contended that two quarters' rent would be due in March, and the question was whether the first quarter after the 8th of September, was deferred until the 25th of March, or to the end of the term. Lord *Abinger* said, "the first *quarterly* payment is to be made on the 25th of March, therefore the previous quarter's rent is either forgiven altogether or postponed to the end of the term." *Parke, Baron*, said, "the last rent would become due at Christmas, 1842, the only consequence is that the lessor will lose his remedy by distress for that rent; he retains his remedy on the contract."

In *Hopkins v. Helmore*, 8 A. & E. 463, when a demise was made on the 21st of March, 1828, *habendum* from the 25th of March, then instant, for the term of seven years, wanting seven days, yielding and paying yearly, and every year during the said term, the yearly rent of £285 by four equal quarterly payments on the 25th of March, 24th of June, 29th of September, and the 25th of December in every year, commencing from the 25th March, then instant; it was contended the lessee was not compelled to pay the last quarter's rent as it was made payable on a day after the end of the term. Most of the judges seem to consider that the first quarter's rent was payable on the 25th of March, 1828, as a *forehand* rent, and they all agreed if this was not the true interpretation, it was a contract to pay £285 every year during the whole seven years, and in either case the lessor would be entitled to recover for the last quarter.

Lord *Holt* decided in *Tompkins v. Pinsent* 2, Lord *Raymond*, 819, S. C. 1 Salk. 141, see note to 7 Mod. 97, when there are special days of payment limited upon the *reddendum* the rent ought to be computed according to the *reddendum* and not according to the *habendum*. But when the reservation is general, as half-yearly or quarterly, and no special days are mentioned, then the half-year or quarter must be computed according to the *habendum*.

Considering the *reddendum* then as fixing the period for the payment of the rent, we must find out what the parties executing the instrument meant from the language used in the *reddendum* as to the payment of the annual sum. Suppose the words had been paying yearly during the said term the sum of \$720, the first payment to be made on the first day of January, 1863. The next payment to be made yearly after that, must be paid not later than the 1st of January, 1864. I think the language used in the lease in its ordinary signification means the same thing, and further that it is intended the payments should be made on the 1st of January, the covenant being to pay the yearly rent on the day and time therein limited and appointed for payment thereof.

It was urged upon us that we ought not to infer anything in favour of a forehand rent, and that the case in Starkies' report is an authority in favour of that view. But the words of the lease in *Hopkins v. Helmore*, were not necessarily stronger in favour of the plaintiff's right to a forehand rent in that case, than the words in this lease favour that view of plaintiff's right in this case, and it was there held by a majority of the judges, that that was a reasonable view to take in that case.

We think the plaintiff is entitled to recover on the terms of the lease, and that the rule should be made absolute to enter a verdict for plaintiff of \$736 57, pursuant to the leave reserved.

A. Wilson, J., and J. Wilson, J., concurred.

Per cur.—Rule absolute.

WOODHILL V. SULLIVAN ET AL.

Canada Company—Powers of attorney—Execution of deed under—Imp. Stat. 6 Geo. IV. c. 75.

Held—1st. That the recitals in the Imperial statute 6 Geo. IV. c. 75 are sufficient proof of the charter of the Canada Company. Secondly. That it is not necessary that deeds from the company should be executed under the company's seal, kept in England, but that the company had power to appoint a special seal for the execution of deeds by their commissioners in this country; and proof of the delivery of a special seal for that purpose to a commissioner then in England, who proved the execution of a deed in this country, in an action of ejectment, *held*, sufficient. Thirdly. That the seal

of a corporation having been proved by satisfactory legal evidence, the production of a document within the scope of the powers of the corporation, with such seal attached, is sufficient *prima facie* evidence of the proper execution of the document.

This was an action of ejectment to recover the west half of Lot No. 24, in the second concession west of Hurontario Street, in the Township of Caledon, in the county of Peel.

The defendants appeared, and besides denying the plaintiff's title, claimed title in themselves from the grantee of the Crown.

At the trial, before the *Chief Justice* of Upper Canada, at the last assizes for York and Peel, the title of the plaintiff was traced through the Canada Company, and the defendants took certain exceptions to the title so derived, on which leave was given to the defendants to move to enter a verdict for them. The verdict at the trial was rendered for the plaintiff.

During Easter Term last, *C. Robinson*, Q. C., moved, pursuant to leave reserved, to enter a verdict for the defendants on the following grounds :

First. That there was no proof of the charter of the Canada Company.

Secondly. That the deed from the Canada Company to the plaintiff was not properly proven ; that there was no sufficient proof either of the seal of the company to the power of attorney produced at the trial, or of the seal of the company to the deed executed by the commissioners of the company to the plaintiff.

Thirdly. That there was no sufficient proof that the seal to the powers of attorney of the commissioners was attached thereto by the authority of the Canada Company.

During the term, *Harrison* shewed cause, and referred to Imperial statute 6 Geo. IV., c. 75, secs. 7 & 8 of that act, and to Imp. stat. 9 Geo. IV., c. 51, and secs. 1, 2, 3.

He contended it was not necessary to prove the charter of the company, as the Imperial acts sufficiently recited the charter, without making it necessary to offer further proof of it.

He argued that there was evidence, clear and conclusive, by Mr. Jones, one of the commissioners of the company

when the deed from the company to the plaintiff was given, that the seal, to the powers of attorney naming himself and the late Mr. Allan commissioners, and also naming Mr. Widder a commissioner of the company, was the seal of the Canada Company; and that the seal to the deed from the company to the plaintiff was the seal of the company, entrusted to the commissioners to execute deeds in this country. He also contended, that the deed to the plaintiff was in the very form prescribed by the Imperial statutes regulating the company, and that the power of attorney by which the seal was to be used by their attorneys in executing deeds, shewed that the company had appointed such seal, and committed the same to their custody; a copy of the seal was appended to the power of attorney.

He urged that only very slight evidence of seals, and authority to affix them to documents like the power of attorney produced was necessary. He referred to *Hall v. Armour*, 5 O. S. 3; *King's College v. Kennedy*, 5 U. C. Q. B. 577-579; *Con. Stat. U. C. c. 32, s. 6*; *Con. Stat. Canada, c. 80, sec. 5*; *Taylor on Evidence*, 2 ed. vol. I. p. 140; *Jones v. Galway Town Commissioners*, 11 Irish Law Rep. 435; *Cherry v. Heming et al.* 4 Ex. 633.

C. Robinson, Q. C., contra.—Though not giving up the point as to the sufficiency of the proof of the charter, felt that the recital of it in the acts of Parliament referred to, afforded strong evidence of the charter without producing it.

He contended there was not sufficient evidence of the seal to the powers of attorney being that of the company, or affixed with the authority of the directors; that the seal appended to the deed from the company, under which plaintiff claimed, was not proved to be the seal of the company; that the company cannot have two different seals—one to be used in England, and one with a different legend to be used in this country. He further urged, that sec. 3 of the Imp. stat. 9 Geo. IV., referred to, shewed that the seal in sec. 2 meant the seal of the company, and was so referred to in that section. He contended that, at all events, it was necessary to shew by proper evidence, that the company had by a resolution constituted the seal used by the commissioners to execute the

deed in question, the seal to be entrusted to them to execute conveyances under sec. 2 of 9th Geo. IV.

The evidence given by Mr. Jones, formerly one of the commissioners of the company, was to the following effect:

That he was a commissioner of the Canada Company, and received his commission in England, and proved the seal of the company to that commission, appointing him and the Hon. William Allan, commissioners, dated 13th August, 1829. He also said he knew the seal of the attorneys of the company, and that it was affixed to the letter of attorney to Mr. Allan and himself, by way of verifying the same; he also proved the seal of the company to Mr. Widder's power of attorney; he proved the seal of the attorneys to the deed from himself and Mr. Widder, dated 1st January, to plaintiff, for the lot in question; he stated he brought out the commission of August, 1829, with him, all sealed; he added, Mr. Allan was not a commissioner in 1850.

Mr. Cull, a clerk in the office of the company, in this province, stated that Mr. Widder and Mr. Jones were the commissioners to execute deeds in 1850.

RICHARDS, C J.—Under the Imperial statute 6 Geo. IV., c. 75, it was declared, in case the King, within three years after the passing of that act, should grant a charter under the great seal of England, to constitute certain persons to be named therein, a body politic and corporate by the name of The Canada Company, and to declare the corporation established for the purposes therein mentioned, and for such other lawful purposes as to his Majesty might seem meet; then it should be lawful for the corporation and their successors to hold such lands and tenements within the provinces of Upper and Lower Canada, as might be granted to them by his Majesty, or as (subject to the restrictions thereafter mentioned) should be contracted for, acquired or purchased by them, and to hold, alienate, sell, and dispose of all such lands, tenements and hereditaments, upon, under, and subject to such conditions, limitations and restrictions as his Majesty, by such his charter, might impose, direct or prescribe.

The preamble to the act referred to the reserving of one-

seventh of the lands granted in Upper Canada for the support and maintenance of a Protestant clergy within the province, and that the greater part of these clergy reserves were waste and unproductive, and it was expedient for adopting means for clearing and cultivating them, and for that purpose, that his Majesty should be authorized to sell a certain part thereof to the company to be established as therein mentioned; and such company was to be established for the purpose of purchasing, improving, settling, and disposing of lands in Upper Canada, and especially for purchasing and settling the whole of the Crown reserves, and such parts of the clergy reserves as his Majesty might be authorized to sell and convey to them, and for such other lawful purposes as to his Majesty might seem meet.

Sec. 7.—Authorised the company to purchase, take, hold and sell all lands, tenements and hereditaments, situate in Great Britain and Ireland, or the said provinces of Upper and Lower Canada, which it might be necessary or convenient for them to acquire in order to carry their purposes into effect, provided the land purchased in Great Britain or Ireland should not be of greater value than £500 per annum at the time the same was purchased, and provided that such purchases in Upper and Lower Canada, should be of such annual value only as his Majesty, by his charter, or by order of the Privy Council, from time to time authorized, and to be made in conformity with the local laws and statutes in force in those parts of his Majesty's dominions in which the land so to be purchased might be situate; and the said company might do all other acts and things in relation to the premises, in all respects as beneficially as any other body politic or corporate, or any subject of the realm was by law entitled to do.

Sec. 8 provided that all conveyances of land which should be made by the said Canada Company to any individual or individuals, of any part of the lands granted to, purchased or held by the company, should and might be according to the following form, *or as near* thereto as the circumstances of the case would admit:

“We, the Canada Company, incorporated, &c., * * * in

consideration of the sum of —, to us paid, do hereby grant and release to — all — and all our right, title and interest to and in the same, and every part thereof, to have and to hold unto the said — and his heirs forever," and that every such conveyance should be valid and effectual in law to all intents and purposes whatsoever.

Imperial Stat. 9 Geo. IV., cap. 51, recites the effect of the previous statute, refers particularly to the power to hold and convey lands, and states that the conveyances were to be made according to the form in the prior act provided; it then recites the charter constituting the subscribers to the company a body politic and corporate in deed and in name, by the name of the "Canada Company," and by that name might sue and be sued, implead and be impleaded in all courts, and should have perpetual succession and a common seal, which might be by them changed or varied at their pleasure, and further recites that by the letters patent provision was made for the government of the company, and that the said letters patent were in all respects in pursuance of and in conformity with the provisions of the said prior act of parliament; but adequate provision was not made for rendering valid and effectual within Upper Canada the conveyances to be made by the company of the lands to be granted or purchased by the company, whereby the operations of the company in settling such lands might be impeded. It was therefore enacted that the company by warrant of attorney, or written instrument under their corporate seal, might constitute and appoint two or more persons being in Upper Canada, to make and execute conveyances in the name and on behalf of the company, to any individual or individuals of any part of the lands to be granted to or purchased or held by the said company, in the manner and subject to the restrictions in the said act of parliament contained, and which said conveyance should be made under the signature of the said attornies *and under such seal* as thereafter mentioned, and according to the form following, or as near thereto as the circumstances of the case would admit, that is to say:

"We, A. B. & C. D., the attornies of the Canada Company, incorporated under and by virtue of an act, and * * * being

constituted and appointed such attornies by virtue and in pursuance of an act passed in the ninth year of the reign of His Majesty King George the Fourth, entitled, —— do hereby, in consideration of the sum of —— to us as such attornies as aforesaid, paid, grant and release to —— all —— and all the right, title and interest of the said Canada Company to and in the same, and every part thereof, to have and to hold unto the said —— and his heirs forever.

(Signed,) A. B.
 C. D.

Sec. 2 authorised the company to revoke such warrant of attorney, and to make other warrants or instruments for like purposes, but such warrants or instruments must not be addressed to less than two persons, and to take effect only whilst the persons appointed should actually be within the province, the section then further provided that it should be lawful for the company to appoint and commit to the custody of such, their attornies, for the time being, a seal, for the purpose of executing such conveyance as aforesaid, and such seal from time to time to break, alter or renew, as to them might seem meet, and every conveyance to be made and executed in manner aforesaid by such attornies for the time being as aforesaid of the said company should be valid and effectual in law to all intents and purposes whatsoever.

Sec. 3 provided that conveyances to be made by the company in the United Kingdom, of lands situate in Upper Canada, should not be subject to any duty of stamps, and that the seal of the company affixed to any conveyance, deed or instrument in writing, or to any memorial or memorials thereof, for the purpose of registration of the instrument in the proper office in Upper Canada, shall of itself be sufficient evidence of the due execution of such conveyance, deed or instrument, or the memorial thereof by the company, for all purposes respecting the registration, and no further evidence of such execution, nor any evidence or verification of the signatures of the directors who shall attest the sealing of such conveyance, deed, &c., or the memorial thereof shall be required for the purpose of such registry, any law or custom in force in Upper Canada notwithstanding.

Taking up the objections in the order in which they appear, I think that as to the first objection that the recitals in the statute seem fully to establish the charter and render any further proof of it unnecessary.

As to the second objection the evidence of Mr. Jones shews that the power of attorney to himself and Mr. Allan, as well as that to Mr. Widder, is under the common seal of the company; that the former was delivered to him at the office of the company in London, and he brought it out to this country, that being undoubtedly the authority under which he was to act in this country. His evidence further leads to the conclusion that the seal of the attorneys appended to the deed to the plaintiff was the seal under which they were authorised to and did execute deeds in this country, and the original power of attorney to himself shews that it was the seal approved by the company and intrusted by them to their attorneys to execute deeds in this country. So far then the second objection, as raised, is met by the evidence. The authorities referred to in our own courts, and in Taylor on Evidence, shew that very slight evidence is necessary to prove corporate seals, and in this respect I think the evidence at the trial sufficient.

Under the objections taken the first section of the act of 9th Geo. IV., already abstracted, speaks of the conveyances being made under the signature of the said attornies, and *under such seal* as thereafter mentioned. Section two, amongst other things, enacted that it should be lawful for the company to appoint and commit to the custody of such, their attornies, for the time being, *a seal for the purpose* of executing such conveyance as aforesaid, and such seal from time to time to break and renew, &c.

These sections seem to provide that the seal to be used by the attorneys in this country, for the purpose of executing the deeds under the statute, may be different from that used by the company in England, and need not necessarily be *the common corporate seal of the company*. The very object of most of the provisions of the Stat. 9th Geo. IV., was to facilitate the execution of the conveyances to be made by the company in this country, and the special provision as to the form of the deed, and the seal to be entrusted to the attorneys was to

carry out that object. Section 3, so far from shewing that the seal to be used by the attorneys for executing deeds here, should be *the* seal of the company, in my judgment shews that *the* seal of the company may be used to execute conveyances in the United Kingdom, of lands in Upper Canada, and such seal would of itself be sufficient evidence of the execution of such conveyance, or of the memorial for registry, and no verification of the signatures of the directors who should attest the sealing of such conveyance would be required.

The seal to be entrusted to the attorneys here, does not seem to be endowed with these characteristics, and would probably require to be proved in the ordinary way.

As to the third objection, that there was no evidence that the seals attached to the powers of attorney were attached thereto by the authority of the company, if the seal itself of a corporation is proved by satisfactory legal evidence, and it appears appended to a document which is within the scope of its powers, be executed by the corporation, and appears on the face of it to be properly executed, the legal presumption is, that it is properly executed until the contrary is shewn.

We dispose of the case simply on the grounds taken in the rule, and do not on any of these grounds feel inclined to disturb the plaintiff's verdict, or to travel out of the rule to discuss other questions which might have been raised in the action.

A. Wilson, J., and J. Wilson, J., concurred.

Per cur.—Rule discharged.

DICKSON V. GRIMSHAW.

Notice of trial—Amendment of pleadings.

After issue joined, and notice of trial served in a cause, the plaintiff applied to a judge to strike out a plea without prejudice to the notice of trial and other proceedings. The order to strike out the plea was granted, but the judge refused to order that the notice of trial, &c., should stand as good for the then altered state of the record. The plaintiff, notwithstanding, proceeded with his case as if the original notice was good, and altered his record to suit the state of the proceedings. (The notice served was notice of trial, while the striking out of the plea required notice of an assessment of damages.) A verdict having been taken, and damages assessed, upon motion to set it aside, *Held*, that the proceedings were irregular; a new trial was therefore ordered.

C. S. Patterson obtained, this term, a rule calling on the

plaintiff to show cause why the verdict and assessment of damages should not be set aside, with costs, for irregularity, on the ground that the *nisi prius* record was altered without authority after it was passed and entered, and no notice of assessment was given, and no interlocutory judgment was signed before the assizes at which the record was entered, or why the assessment should not be set aside as excessive, and because damages for building and otherwise expending money on the property were included in the assessment, and were not warranted by the agreement declared on; and because of the death of the doweress named in the agreement.

The facts, from the papers filed, appear to be, that the issue books were made up and served, notice of trial given, and the *nisi prius* record, passed *and entered* for trial at the last Cobourg assizes, while there were two pleas on the roll. The issue books were served on the 21st of March last, and the notice of trial on the same day. The *nisi prius* record was entered for trial on the 29th of the same month.

On the 24th of March, an application was made in chambers for a summons calling on the defendant to shew cause why the first plea [being the only plea to the first count] should not be set aside, and the plaintiff be allowed to sign judgment as for want of a plea, without prejudice to the notice of trial already served, and that such notice should be allowed to stand as a notice of assessment of damages on the first count, the plea having been pleaded against good faith; or why the plaintiff should not be at liberty to reply to the same on equitable grounds.

The summons was enlarged by consent of parties, till the 29th of March, at which time, coming before the same judge [the Chief Justice of Upper Canada], he refused to allow the notice of trial to stand as a notice of assessment, because the plaintiff had a knowledge of all the facts when he took issue on the plea, and he ought then to have replied equitably, or to have had the plea struck out, and he ordered merely that the plea should be struck out, and that the plaintiff might sign judgment as for want of a plea to the first count.

This order was drawn up on the 30th of March, and a copy of it was attached to the *nisi prius* record.

That the plaintiff's attorney, without any authority, and without the consent of the defendant's attorney, struck out the first plea from the record, and added to the record an entry of judgment for want of a plea to the first count.

The Record was not re-passed or reëntered after such alterations.

That on the 5th of April, and before the cause was called on for trial or assessment, the defendant's attorney gave notice to the plaintiff's attorney, that if the plaintiff proceeded to trial or assessment at the then present assizes, the defendant would move to set aside the verdict.

That on the same day, and after service of this notice, the plaintiff proceeded and did assess his damages at \$1722 [or \$1792].

That the defendant's attorney did also in open court, before the jurors were sworn, object to the cause being proceeded with, and that no one appeared at the trial for the defendant, or consented to the same.

H. Cameron shewed cause. The plaintiff had the right to alter the record, it was the necessary result and meaning of the judge's order; he had also the right to proceed upon it in its altered state, without any new notice of trial or assessment, and without repassing or reëntering the record. *Davis v. Davis*, 4 O. S. 322.

C. S. Patterson, contra.—The plaintiff should have proceeded upon his altered record according to its altered condition, but this he has not done, for he has acted upon it as if it had never been altered.

ADAM WILSON, J.—We should think that after issue joined, the issue-book made up and served, notice of trial given, the *nisi prius* record passed and entered for trial, and leave then given by a judge to strike out a plea, and to sign judgment as for want of a plea, (but the judge expressly declining to proceed any further for the plaintiff's benefit, because, of the plaintiff's own conduct in deliberately taking issue, and serving notice of trial,) that there can be no doubt the plaintiff could not, upon striking out the plea and signing judgment,

insist upon the notice of trial before given for one state of the record, standing for another and quite inapplicable state of the record, from that for which the notice was given.

If this be ever done, it must either be by the consent of parties, or by direction of the court or a judge. But no consent is pretended here, and the judge pointedly refused to allow the old notice to stand as a good notice according to the new state of things.

Nor had the plaintiff any authority whatever to alter the record without leave having been duly granted for the purpose.

As we think the plaintiff's proceedings irregular, and the cause must again go down to trial, we have no occasion to express any opinion upon the other questions which were argued before us.

Per cur.—Rule absolute, setting aside the assessment of damages, for irregularity, with costs.

BIGELOW V. STALEY.

Promissory note—Collateral security for by mortgage—Discharge of—Estoppel.

Plaintiff being indebted to defendant on a promissory note for \$106 and book debts, executed a mortgage to him for £50. The land in said mortgage comprised was sold by plaintiff, and after payment of the prior incumbrances thereon, there was left the sum of \$90 to be applied on defendant's mortgage, on payment of which sum defendant executed a discharge thereof. Defendant subsequently sued plaintiff in the Division Court for a balance on said note and book debts, and recovered the sum of \$——. Plaintiff now sues defendant for fraud, in defendant's having sued him for said note, alleging that when said mortgage was given, defendant agreed to give up said note when the mortgage was satisfied.

Held, 1st. Declaration not proved in fact.

2nd. Discharge of mortgage not being under seal, not an estoppel.

3rd. That if declaration had been proved plaintiff could not, after failing in division court suit, maintain the action.

An appeal from the County Court of the county of Ontario.

The 2nd count of the declaration stated [the 1st, 3rd and 4th having been abandoned at the trial, and struck out of the record]:—That the plaintiff, before and at the time of the committing of the grievances by the defendant, made and

delivered to the defendant his promissory note, for the sum of \$106 15, payable three days after the date thereof, to the defendant or order. And the defendant, intending to injure and defraud the plaintiff, falsely, fraudulently and deceitfully pretended and represented to the plaintiff, and thereby induced him to believe, that if the plaintiff would make and deliver to the defendant a mortgage deed, conveying to the defendant the S. W. quarter of Lot No. 1 in the 8th Con. of the township of Scugog, subject to redemption by the plaintiff on payment to the defendant of the sum of £50 and interest thereon, the defendant would immediately on the satisfaction and discharge of the mortgage deed by the plaintiff, or by any other person for him, deliver up the said promissory note to the plaintiff to be cancelled. And the defendant, by means of the false, fraudulent and deceitful pretence, then wrongfully and fraudulently induced the plaintiff, on the 30th day of June, in the year 1858, to make and deliver to him the mortgage deed. But the plaintiff says that although the mortgage was afterwards, on the 27th day of October, in the same year, duly satisfied and discharged, the defendant did not and would not deliver up the promissory note to the plaintiff to be cancelled, but kept and retained the same against the plaintiff, whereby the plaintiff has incurred and been put to serious loss, damage and expense.

The defendant pleaded not guilty.

At the trial :

Martin Staley, a son of the plaintiff said,—I was present when plaintiff gave defendant a mortgage ; it was security for what plaintiff owed him, about £38, including a note which defendant had for \$106 15, which he was to give up on getting the mortgage [which was for £50]; the note was then to be given up.

In June, the plaintiff asked for the note ; the defendant said he was busy then. The plaintiff was to call another day and get it. * * * * The mortgage was for £50, to cover a further advance in money. I have got things out of defendant's store, since the date of the mortgage, on plaintiff's account. * * * * When the mortgage was given, the defendant agreed to give up the note ; he thought the

note was not good security ; I was at the Division Court when the suit on the note was tried ; I was not a witness ; plaintiff defended that suit ; plaintiff applied for a new trial ; I know defendant agreed to give up the note on getting the mortgage. * * * * The note of Daniel Staley was given as security for plaintiff's debt to defendant.

John Wynn said :—I was present in the summer of 1858, when defendant said to plaintiff, if he would get him a mortgage on his farm, he would give him up his note for \$106 ; I suppose he meant the Daniel Staley note ; * * * * I always thought it was Daniel Staley's note ; though the amount mentioned was \$106.

Philip Potter said : plaintiff had a writing from defendant about the Daniel Staley note ; that paper stated that when further security was given to defendant by plaintiff, the Daniel Staley note was to be returned.

Richard Lund, clerk of Division Court, said :—There was a suit in my court 2nd November, 1859, defendant against plaintiff for a balance on note of plaintiff for \$106 15, and an account ; judgment entered for plaintiff in that suit, 18th November, 1859, for \$99 65, amount of execution. Credit on account is for £22 10s., as received from Stephen Cole ; I think this suit was defended at the trial by the plaintiff ; Staley afterwards sued Cole for the amount paid to Bigelow, the defendant ; witness proved the hand-writing of Bigelow to the discharge of mortgage.

Edward Majors, bailiff of the Division Court, said he collected for plaintiff, on the execution from Division Court, at suit of Defendant, \$103 90 ; did not sell plaintiff's goods.

It appears Cole bought the plaintiff's farm, and as there were several mortgages upon it, and judgments against the plaintiff, he was buying up the claims at a reduced rate ; Cole said Bigelow was not willing to take less than \$100 for his claim.

The defendant, in his answers to interrogatories administered to him, admits the mortgage was given as collateral security for the payment of the note of \$106 15, and future advances ; but that he was not to give up the note when the mortgage was given, as the mortgage was only given as colla-

teral security; and it was understood the note was not to have been given up until the full amount of his claim, that is, the note and any book account he might have against the plaintiff, after the date of the note, were paid; and that he did not consider D. Staley's note good security, nor the mortgage either, as the land was encumbered with several judgments and mortgages prior to his mortgage.

It was objected at the trial by the defendant's counsel:

1. That the allegation as to the time of giving up the note was not proved.

2. That the action could not be sustained without proof of fraud, and none was shewn, and,

3. That the action was brought to recover an amount already sued for.

For the defence:

Stephen Cole was called, and he said:—I hold a mortgage on this land for the sum of £118 00
I afterwards bought another from Meredith for not

quite 25 00

I also bought the Washington mortgage 50 00

In 1858, I purchased the place; I paid the defend-

ant on account of his mortgage of \$200 22 10

Both parties came to my place for the purpose of my buying it; plaintiff gave me the deed for the lot; the mortgage was discharged; the place was not worth enough to pay all the claims; Bigelow's mortgage was fourth; he would discharge the mortgage for \$90, and release the land from his mortgage. I think the whole claims on the land, when I bought, were \$1000 or more; I understood Bigelow, who was also proposing to buy it, was to give plaintiff \$1000 for it; and I also understood from all parties, that the discharge of the mortgage was to be a discharge of the plaintiff altogether; I do not remember to have heard defendant say so.

Upon which a verdict was given for the plaintiff of \$180.

The defendant, in the ensuing term, obtained a rule on the plaintiff to shew cause why a nonsuit should not be entered, pursuant to leave, or for a new trial.

After hearing counsel, the learned judge discharged the rule. He said it was left to the jury to say if they believed

from the evidence there had been a previous adjudication substantially for the same cause for which this action was brought, although the form of it was for deceit, they should find for defendant.

That there was no such variance between the proof and the declaration regarding the time when the note was to be delivered up, as to be fatal to the plaintiff's recovery after verdict.

That fraud was sufficiently shewn, but the damages were to high.

That as respects a new trial, though not satisfied with the verdict, still as this was the third time a verdict had been rendered for the plaintiff, he could not interfere and prolong litigation, and he concludes :

“ It is true the evidence shewing a former adjudication was to my mind pretty clear and conclusive ; yet after three findings, of as many different juries to the contrary, I am forced to the conclusion that my view of the evidence on that point was wrong.”

The grounds of appeal stated are :

1. That the action is to recover back money paid under compulsion of legal process, and a nonsuit should have been ordered.

2. That the variance as to the time alleged in the declaration, and not disclosed by the plaintiff's evidence, was a material variation ; and the plaintiff should have been nonsuited ; [there is some mistake in stating the grounds of appeal, for it is not very sensible as it stands ; but if it be sensible, it is quite useless as a valid ground of exception ; what is meant is that which has been stated before, “ that there is a variance between the time stated in the declaration, when the note was to have been given up, and the time proved at the trial.”]

3. That no damage was proved to have been sustained by the plaintiff ; that the plaintiff shewed no fraud on the part of the defendant.

4. That the verdict was contrary to law, evidence, and the judge's charge, and the damages are excessive.

Another objection was taken at the trial and in term, and

is now stated as a ground of appeal, "that the contract proved was concerning an interest in land, and was not in writing," which the court did not notice, as it had no application to the facts or cause of action in this case.

Crooks, Q. C., for appellant, relied chiefly on the objection taken, that this action was substantially an attempt to reöpen a recovery already had in a court of law by the defendant, who was successful in that suit against the plaintiff. *Routledge v. Hislop*, 6 Jur. N. S. 398; *Barber v. Lamb*, *ibid.* 981.

S. Richards, Q. C., contra. The agreement to give up the note was equivalent to an engagement not to sue upon it, and the plaintiff is entitled to sue for a breach of such a bargain; it is plain there could have been no breach of it until after he had brought a suit, and now that it has been brought it cannot be defeated upon the very ground which gives the cause of action.

ADAM WILSON, J.—The facts which are set out in the count are not sustained by the evidence. There is no evidence whatever that the defendant *falsely and fraudulently* represented to the plaintiff that if he would give a mortgage to the defendant, he, the defendant, would, on discharge of the mortgage by the plaintiff or by any other person for him, deliver up the promissory note in question to the plaintiff. There is no evidence, assuming the facts to be true, that the defendant did not mean to do all it is said he promised to do when he got the mortgage; there is no reason for saying this was only a pretence by the defendant to get the mortgage from the plaintiff, and that he really meant all the while not to give up the note to the plaintiff, nor is it possible to strain the facts even on a failure of performance by the defendant into evidence of a prior and preconceived fraudulent design. If all this be so, and we think there can be no question of it, the result is that the defendant may have broken his promise and engagement, and should be answerable for it, but he is no more chargeable with fraud than any other person is who fails strictly and literally to keep the contract he has entered into.

Then again the promise, such as it is, was not proved. The promise is said to have been, to deliver up the note to the plaintiff "on the payment and satisfaction of the mortgage," while the proof by the plaintiff's own witnesses is that the note was to have been delivered up "on the giving of the mortgage to the defendant," or as the defendant himself stated, "that the note was not to be given up until the full amount of his claim, the note and any book accounts he might have had been paid." Nor is the promise as laid shewn to have been broken by the defendant. He was to give up the note when the mortgage was satisfied and discharged by the plaintiff or by any other person for him, but this mortgage was never in truth "satisfied and discharged by the plaintiff or by any person for him." It is true the defendant has executed the ordinary instrument, acknowledging the satisfaction of the mortgage, but this was for the purpose of enabling the plaintiff to sell the land to Cole free from the mortgage, and not for the purpose of acquitting the plaintiff from the debt which he owed to the defendant. It is not under seal, and no doubt the purpose for which it was given, and the facts which led to its being given are explainable, and do not irremediably preclude the defendant from the recovery of his debt upon just proof being made that the debt was not thereby to have been nor intended to have been released.

Now this mortgage has not in this sense been satisfied and discharged, for the defendant received \$90 only on account of his claim, the land not having sold for a sufficient sum to permit of more being paid to the defendant who was the fourth mortgagee. Cole, the purchaser, says, he understood that the discharge of the mortgage was to have been a discharge of the plaintiff, but he did not hear the defendant say so. Less this \$90 then, the defendant was apparently still entitled to recover the amount of his claim, consisting of the promissory note and his store account contracted subsequently to the giving of the note.

But suppose the fraud and all the facts in the count proved precisely as charged, can the plaintiff recover after the trial and proceedings had between himself and the defendant in the division court? The complaint in the count is, "that

the defendant did not deliver up the note to the plaintiff to be cancelled, but kept the same, whereby the plaintiff was put to serious loss, damage and expense," any evidence therefore, which established that the defendant ought to have done this, would have been a defence to any action brought upon the note by the defendant, against the plaintiff, to enforce the payment of it as a valid and legally outstanding subsisting instrument. And if any such action to enforce payment of it were brought by the defendant against the plaintiff, and the plaintiff either did not set up this defence, or setting it up failed to recover upon it, he cannot reagitate this question in any manner whatever in any future action.

No maxim is more beneficial to the public, however hardly the application of it may be in occasional cases, than the one "*interest reipublicæ ut sit finis litium.*" Every suit is presumed to be a just suit; the action which was brought in the division court was, and is therefore, within this rule.

In *Gilding v. Eyre*, 10 C. B. N. S. 604, it is said that "it is a rule of law that one shall not be allowed to allege of a still depending suit that it is unjust." This is the reason why, in an action for a malicious prosecution, it is necessary to state the determination of the former proceeding in the plaintiff's favour. It is suggested also in the same case, as a reason for this rule, "that it would be inconvenient to have two actions, involving the same issue, going on at the same time."

The plaintiff cannot now complain of the division court suit having been brought unjustly, because the judgment was against him, and its justice or injustice must be determined by the final result, and if it be not unjust how can his present cause of action be just or true? This is the very ground upon which the case of *Rutledge v. Hislop* was put. There a servant sued her master for discharging her without reasonable cause—the decision was against her. She afterwards sued her master for a quarter's wages, covered by the time involved in the first action, and it was held that the matter for the consideration of the justices in the second case was the same identical matter which had been decided by the judge of the county court in the first case, viz: whether the discharge was

wrongful and without just cause, and therefore the decision in the county court was conclusive between the parties. *Hill, J.*, said, "the same identical questions would be before both tribunals—was the plaintiff hired? was she wrongfully discharged? In the one proceeding she would claim damages, in the other wages which she was prevented from earning." The case of *Marriott v. Hampton*, in 2 Smith's leading cases, 356, may also be referred to. If the agreement set out in the count be construed as an agreement not to sue, it would equally conclude the plaintiff from maintaining the suit, for in such a case it is to be construed as a release to avoid circuity of action, and no such defence was put forward in the division court suit, 2 Saund. 150, a. b.

In *Walmesley v. Cooper*, 11 A. & El. 216, Lord *Denman*, C. J., says, "A covenant not to sue has been held equivalent to a release on no other principle than that of avoiding circuity of action, *i. e.*, the scandal and absurdity of allowing A. to recover against B. in one action the identical sum which B. has a right to recover in another against A. The law when it clearly detects the possibility of such a waste of the suitor's money, and its own process, as well as of the public time, will interpose to prevent its happening."

The same rule will, we think, apply, although there is not a covenant to sue, but an agreement merely not to sue which is founded upon a good and valid consideration. The principle is precisely alike in both cases.

We think upon the leave reserved to enter a nonsuit, which does not seem to have been disputed by the plaintiff, nor by the learned judge, although such leave does not appear as it ought upon his notes, that a nonsuit should now be ordered to be entered.

Per cur.—Nonsuit ordered in court below.

IN RE. CAMPBELL AND THE CORPORATION OF THE CITY OF KINGSTON.

Municipal Institutions Act, sec. 294, sub-secs. 4 and 15—Harbour dues—Firewood Tolls thereon.

Held—That a clause in a by-law which imposed tonnage dues on scows, craft, rafts, railways cars, &c., coming into the city of Kingston, containing firewood to be exposed or offered for sale, or marketed for consumption within the city, was illegal, and not authorized by subsec. 15 of sec. 294, of the Municipal Institutions Act; the toll or duty must be imposed upon the vehicle *in which anything is exposed* for sale in any street or public place.

The fourth subsection of the same section only authorizes the imposition of reasonable tolls on vessels and other craft, for the purpose of cleaning and repairing harbours, and paying a harbour master, and does not sanction the levying such dues for the revenue purposes of the municipality to which the harbour belongs.

During Easter Term *Kirkpatrick* obtained a rule on behalf of James Campbell, calling on the Corporation of the City of Kingston to shew cause why section 33 of the by-law passed on the 20th April, 1864, entitled, An Act to regulate the public Markets in the City of Kingston, should not be quashed, with costs, on the grounds :

1. That such section is in excess of any authority conferred by law on the said corporation.

2nd. It is not within the powers conferred on the said corporation by the 15th subsection of sec. 294, of c. 54 of Con. Statutes of U. C., or any other clause or subsection of the act.

3. Because it assumes to impose toll on all carriers of produce and articles therein mentioned to the City of Kingston, and does not confine such tolls to articles and produce exposed for sale or marketed in the city of Kingston. And,

4. Because it imposes a toll on the boats of private persons bringing such articles to the city for their own consumption.

The by-law was verified by the seal of the city and the certificate of the city clerk, and there was appended to it the affidavit of Campbell, stating that he was a wood-merchant, and carried on his business as such in the city of Kingston, and that he resided in the city. He also stated in his affidavit that he received the by-law annexed to it from the city clerk.

During the term, *Prince* supported the rule, and *D. B. Read*, Q. C., shewed cause. He contended that though the

section of the by-law complained of, could not be entirely sustained, under the 15th sub-section of sec. 294, but with the aid of sub-sec. 4, it might all be considered as good. He urged that the section might be good in part, and if so, the court ought not to give costs for quashing the part which was bad ; and the good part ought to be sustained.

He referred to *Farquhar v. Corporation City of Toronto*, 10 U. C. C. P. 379 ; *In re. Smith v. The City of Toronto*, ib. 225 ; *Patterson v. The County of Grey*, 18 U. C. Q. B. 189 ; *Gibson v. The United Counties of Huron and Bruce*, 20 U. C. 111 ; *Tobacco Co. v. Woodroffe*, 7 B. & C. 838 ; *Poulterers Co. v. Phillips*, 6 Bing. N. C. 314 ; *Regina v. Edmonds*, 4 E. & B. 993 ; *Tyson v. Smith*, 6 A. & E. 745 ; *Lockwood v. Wood*, 6 Q. B. 31 ; *Regina v. Everett*, 1 E. & B. 273 ; *Grant on Corporations*, 160.

RICHARDS, C. J.—I think the 33rd section of the by-law bad, and it must be quashed. The by-law itself is entitled, *A By-law to regulate the public Markets of the City of Kingston*.

The 32nd section of the by-law provides that each and every waggon, sleigh, cart, truck, or other conveyance, containing firewood, lumber, shingles, laths or ladders, being exposed for sale or marketed in the city, shall be subject to a toll of seven cents, if drawn by two or more horses or other animals, and if drawn by only one horse or other animal, five cents.

Sec. 33 enacts, that each and every scow, vessel, wood-boat, raft, crib, sailing craft or railway car, arriving in the city of Kingston, or harbour thereof, and containing firewood, being or having been brought to the city for the purpose of being exposed, offered for sale, or marketed for consumption, within the city, and all boats, rafts, cribs or railway cars, bringing to the city or into the harbour for delivery at, or consumption in the city, firewood, coal, charcoal, poles, lumber, potatoes, fruit, butter, cheese or vegetables, shall be subject and liable to a toll of twenty-five cents for every ton's capacity, and so proportionably ; and the clerk of the market, or the lessee of the market tolls, or his authorized assistant,

is thereby authorized and empowered to collect and demand payment of said toll, and all other tolls chargeable or collectable under that act from the owner or owners, or master or person in charge of the said boats or sailing craft aforesaid, and from the owner or driver of every waggon or other vehicle mentioned in the immediately preceding section of the by-law ; and all and every person or persons refusing to pay such toll or tolls aforesaid, being liable to pay the same, shall be deemed guilty of a breach of this by-law.

The 60th section of the by-law provides that any person violating the provisions of the by-law, or failing to observe them, shall be guilty of a breach of the by-law and shall be summoned before the mayor, police magistrate, or any alderman of the city, and if convicted, on testimony of one or more credible witnesses, should be fined a sum not more than fifty dollars, nor less than fifty cents ; which fine and costs, if not paid forthwith, should be levied of the goods and chattels of the offender, if sufficient, or in default of payment or of sufficient distress, the offender might be imprisoned in the common gaol in the city, for any period not greater than 21 days, at the discretion of the convicting magistrate.

Sub-sec. 4 of sec. 294 of the Municipal Institutions Act, in effect provides that the council of every city may pass by-laws for regulating harbours, for preventing the filling up or encumbering thereof ; for erecting and maintaining the necessary beacons and for erecting and renting wharves, piers and docks therein, and also floating elevators, derricks, cranes, and other machinery suitable for loading, discharging or repairing vessels ; for regulating the vessels, crafts and rafts arriving in any harbor ; and for imposing and collecting such reasonable harbour dues thereon as may serve to keep the harbour in good order, and to pay a harbour master. This provision is under the head of " Harbours, Docks, &c."

Then under the head of " Markets," sub-sec. 15, " for regulating all vehicles, vessels and other things in which anything is exposed for sale or marketed in any street or public place, and for imposing a reasonable duty thereon and establishing the mode in which it shall be paid."

This 15th sub-section of the statute does not in my opinion

authorise the imposition of tonnage dues on scows, crafts, rafts, railway cars, &c., coming into the city, merely because they contain firewood, though such firewood may have been brought into the city "for the purpose of being exposed or offered for sale, or marketed for consumption within the city." What the statute authorises is the regulating the vehicles, vessels, &c., *in which anything is exposed for sale or marketed in any street or public place*, and for imposing a reasonable duty thereon. When the commodity is exposed for sale in any street or public place, the power to impose the duty, if it is really given, arises, and if it be intended to impose the duty on the vehicle or vessel it must be on that in which the article is exposed for sale or marketed in any street or public place.

That part of the section of the by-law under discussion which declares that all boats, rafts, cribs or railway cars, bringing into the city or into the harbour, for delivery at or consumption in the city, firewood, coal, charcoal, &c., fruit, butter, cheese or vegetables, shall be subject to a toll of 25 cents for each tons capacity, is clearly bad.

There can hardly be a doubt that the 15th sub-section of the statute which I have quoted does not authorise this. The wood or other articles may not be intended to be used or consumed within the city at all, yet coming within the market regulations the vessel bringing it there would be bound to pay this charge even if the wood were delivered at Kingston to be shipped on board a return vessel to be sent to Toronto, and the butter was delivered at the city to be forwarded to Montreal. The legislature, in my opinion, never contemplated that under pretence of passing a by-law to regulate the markets of the city, that city corporations should have the power of levying a tax on the general commerce of the country merely because a particular town or city happened to be the place where forwarders were in the habit of transshipping commodities from one description of craft to another, and where merchants frequently contracted that certain articles in which they dealt should be delivered in view of this very practice of transshipment.

I fail to see that the 15th sub-section of the statute in any way sustains this section of the by-law.

I think under the 4th sub-section it is equally bad. So far from that clause being intended to cover market regulations, which this by-law is passed for establishing, it relates to the maintaining, supporting and preserving harbours, and to regulating the vessels, crafts and rafts arriving in the harbours, and the power to impose charges is limited to such reasonable harbour dues as may serve to keep the harbour in good order and to pay a harbour master.

It is not even suggested to us, much less shewn by affidavit, that any money is or has ever been expended to keep the harbour in good order, nor are we informed that there is any harbour master there for the payment of a salary so that these charges could be properly imposed.

It seems hardly necessary to discuss the question at much length to shew that we ought to hold that the 4th sub-section of the statute first quoted does not authorise the passing of the 33rd section of the by-law. The fact that the section itself does not seem to be framed with a view to regulate the harbour in any way, or to direct that vessels shall be under the control of a harbour master or harbour regulations, and that it applies only to vessels carrying peculiar kinds of commodities, most of them more the subject of market regulations than harbour regulations, would seem to indicate that it could not be intended to apply to harbour regulations. These, with the other circumstances already referred to, that there is nothing to shew that there is a harbour master or harbour regulations in Kingston, seem to me ample to sustain the view I take that the section complained of is bad. I should also incline to the opinion that unless it could be shewn there were some peculiar reasons justifying a special tax on the craft carrying the articles mentioned in this section of the by-law, the court would hold it was not reasonable to select that class of vessels only for the payment of harbour dues, when other vessels escaped which appear to be equally properly the subject of that kind of tax, and on that account a by-law framed expressly under the 4th sub-section would probably be quashed if the dues were only imposed on a particular class of vessels.

On the whole I think the 33rd section of the by-law should be quashed with costs.

McCARTHY V. OLIVER.

Sale of standing trees—Timber manufactured therefrom—right of possession—Replevin.

Plaintiff having by parol agreed with the defendant for the sale to and purchase by the latter of certain standing trees, permitted defendant to cut the same down and to manufacture them into square timber. Subsequently a dispute having arisen (the defendant in the meantime having removed the timber from the land), plaintiff replevied same.

Held—That by permitting defendant to cut down and manufacture the timber, the plaintiff thereby gave up possession thereof, and his lien for purchase money was lost to him in consequence.

This was an action of replevin. The writ was issued on the 9th February, 1864. The declaration alleged that defendant, in a certain close called Lot No. 21, in the 8th concession of the township of Tecumseth, took fifty-one pieces of oak timber, and one piece of white pine timber, the goods of the plaintiff, and unjustly detained the same, against gages and pledges, until, &c., and plaintiff claimed a return of the goods, and \$100 damages for the detention.

Defendant, on 30th March, 1864, pleaded :

1st. Not guilty.

2nd. That the goods were not, nor were any or either of them the plaintiff's as alleged.

3rd. That he did what was complained of by the leave and license of the plaintiff.

On these pleas issues were joined. The cause was taken down to trial at the last assizes for the county of Simcoe, held before *Hagarty, J.*, when a verdict was rendered for the plaintiff for nine pieces of the timber replevied, and 15s. damages.

The points raised at the trial make it necessary to refer to but a small portion of the evidence. It appeared that the defendant purchased from the plaintiff some of the oak trees standing on his lot, for the purpose of being manufactured into timber ; a dispute arose as to the quantity to be taken. Plaintiff contended that defendant's workmen were cutting over the line agreed upon ; they had then cut about four or five trees beyond the defined mark. Plaintiff's foreman ordered the men to desist ; plaintiff consented that they might cut the tree they were then at work at. Plaintiff and defendant's foreman then walked through plaintiff's woods

and examined the standing trees; plaintiff said he would let defendant take some other trees which could be cut without much slashing. After consulting with defendant, his foreman offered plaintiff \$5 each for trees to manufacture forty-two pieces of oak and one piece of pine, to which plaintiff agreed, and they so made the bargain. The trees were to be cut all over the lot. After that, defendant manufactured forty-two pieces of oak and one of pine from these trees; before that, eight pieces had been made under the former agreement. Plaintiff daily saw defendant's men at work cutting down the trees and manufacturing them into timber, without objection. Some dispute having arisen about the amount plaintiff was to be paid for the trees, and whilst plaintiff and defendant were at Barrie, trying to settle, defendant's workmen drew most of the timber off the place to Bradford, and plaintiff never received his pay. He then took out a writ to replevy the whole fifty-two pieces, and the sheriff seized that number of the pieces at Bradford, supposed to belong to defendant. Of these fifty-two pieces so seized, the jury found that only nine were made on the plaintiff's land and from his trees.

At the end of the plaintiff's case, it was objected that replevin would not lie; that there was a contract for all the trees which plaintiff allowed defendant to manufacture into timber, and that this made them defendant's property. There were other points raised against the recovery, not now necessary to refer to. The learned judge gave leave to defendant to move to enter a nonsuit, if a non-suit could be entered in this action, or to enter a verdict for defendant.

In Easter Term last, *C. S. Patterson*, pursuant to leave reserved, moved to enter a non-suit or verdict for the defendant, and on the ground that under the contract proved, being for the cutting down of trees at an agreed price for the timber to be manufactured therefrom, no lien for the purchase money attached upon the manufactured timber, but the possession thereof was in the defendant.

During the term, *McCarthy* shewed cause, and contended that though there may have been an agreement to sell, void under the Statute of Frauds, yet by virtue of his title to the

land, plaintiff was in possession of the trees, and so continued, and if defendant after that manufactured them into lumber, plaintiff's possession continued, and he could maintain the action, as no property passed to defendant under the contract. That under the plea of leave and license, defendant ought not to succeed, as the license alleged to have been proven does not shew that he was authorized to take the timber away. He referred to *Smith v. Surman*, 9 B. & C. 568; *Acraman v. Morrice*, 8 C. B. 449; 10 U. C. L. J. 120.

Patterson, contra.—The agreement was \$5 a tree for part, and for the residue a certain sum per foot after it was manufactured. It is not shewn that of the few pieces replevied which came from the plaintiff's land, whether they were those sold by the tree or by the foot. Though the agreement might have been void as to passing the property in the trees before they were cut, yet in effect it was permitting defendant by his consent to cut and manufacture these trees into lumber. Suppose, instead of making into timber on the lot, it had been made into some other manufactured article, in a shop on plaintiff's premises, by his consent, such other article could not be replevied. *Tansley v. Turner*, 2 Bing. N. C. 151; *Dixon v. Yates*, 5 B. & A. 313.

RICHARDS, C. J.—There is no doubt that the sale of standing trees is the sale of an interest in land, and to be good under the Statute of Frauds must be in writing. But a license to go upon land and cut down trees, I apprehend, may be good though by parol; and even if it be a license accompanied with an interest, such license it seems may be revoked at any time, though if there be a sufficient grant of the trees, and a license to go and take them, then there is such an interest accompanying the grant that the grantor would probably be estopped from denying the license. *Wakley v. Froggatt*, 33 L. J. Ex. 5; S. C. 9 Law Times, N. S. 340, has some slight bearing on this point. The leading modern case on the subject is *Wood v. Leadbitter*, 13 M. & W. 838. In that case there is an extract from the judgment of *Vaughan*, C. J., in the case of *Thomas v. Sorrell*, *Vaughan's Reports*, 351, which tersely puts the matter as to the effect of a parol license: "A

dispensation or license properly passeth no interest nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful. * * * As a license to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use *are licenses*, as to the acts of hunting and cutting down the tree, but *as to the carrying away of the deer killed and tree cut down they are grants.*"

It appears from the evidence that after the parol agreement, proved at the trial, had been made, the plaintiff passed the place daily where defendant's men were at work, saw them making the timber and made no objections to their doing so. I think this is evidence to go to a jury that after the trees were cut and had become personal property the plaintiff was willing that defendant should act on the parol agreement from that time forth, and as to the trees after they were cut, or each tree after it was cut, that he was willing that the defendant should take it into his possession and manufacture it into lumber, the price to be paid for each tree being that which had already been agreed upon. I think the plaintiff, if he had desired so to do, could have revoked his license as soon as the defendant had cut a tree, and if defendant remained on plaintiff's land after that, he would have been a trespasser, and no property in the tree would have passed to plaintiff. But if, after the tree was cut on the parol license, plaintiff allowed defendant to go on and manufacture it into lumber, permitted him to take and continue in possession of it for that purpose and to expend his time and labour or money on it, supposing all the time that plaintiff was willing he should do so on the terms of the original agreement; to allow the plaintiff after this to resume possession of the timber as his own would be a monstrous injustice, which, in my opinion, the law will not permit.

I think therefore we must consider the matter under the evidence the same as if the agreement had been made (after the trees had been cut down) to sell them to the defendant at

the price mentioned, to be manufactured into lumber, and that defendant took possession of them on plaintiff's land, and did there make them into lumber. Nothing being said about the time of payment, plaintiff could have retained possession until he was paid, but having given defendant possession of the trees, or what is the same thing, in my view of this case, having permitted him to take such possession without objection, to manufacture them into lumber, without reserving any right to retake them for the unpaid purchase money, or any stipulation that defendant should not take possession until he had paid for them, I think his lien is gone.

The latest case I have seen on the subject, which as to the important facts, bears the closest resemblance to this, is that of *Smith v. Hudson*, reported in 8 Law Times, N. S. at p. 253. The head note of the case is, that plaintiff by parol agreed to buy of defendant all the potatoes in a certain field of defendant's, at so much a ton, and to dig and remove them at his own expense. He employed and paid labourers to dig them, and sent his own sacks to the field, in which sacks the potatoes as they were dug were placed by his men, and the sacks were then carried to another part of the field, and the potatoes then emptied out of them in heaps, or "clamped" on the ground. During the digging, one sack-full of the potatoes was by plaintiff's authority taken by one of the men employed, and consumed by him for food. Before the whole were dug, defendant refused to complete his contract, or to permit the residue of the potatoes to be dug, or those which had been dug to be removed from the field.

It was held, there was under the facts evidence of a part delivery and acceptance within the 17th section of the Statute of Frauds. On the argument, it was said the defendant never gave up his lien over the potatoes; they remained on his land. They had never been out of his possession, and the right to stop them had never gone, suppose it a ready money transaction, *Martin*, Baron, said, defendant had no right to touch the potatoes, after they were dug; from that moment his lien was gone. In giving judgment in *Holmes v. Hoskins*, 9 Ex. 755, Baron *Parke*, referring to *Elmore v. Stone*, 1 Taunton, 458, "Where the defendant, having at first objected to the price

which the plaintiff asked for the horses, afterwards sent word the horses were his, but as he had neither servant nor stable, the plaintiff must keep them at livery for him," said, when the vendor assented to the purchaser's request, there was an acceptance (by the vendee I understand it) by which the former lost his lien. Many of the cases on the subject of part acceptance, to satisfy the Statute of Frauds, are referred to and discussed in *Castle v. Swoorder*, in the Exchequer Chamber, 6 H. & N. 828.

Tansley v. Turner et al., 2 Bing. N. C. 151, is referred to as supporting the proposition that whenever the vendor has given the purchaser the actual possession of the goods, in fulfillment of the contract of sale, all the vendor's rights over them are of course completely gone, though they remain in his custody, or have not been removed from his premises. The facts of that case do not in my opinion make it so strong an authority for the defendant as *Smith v. Hudson*.

On the whole, then, though by no means clear from doubt, and in which doubt my brothers participate, I think the property in the timber made from the trees sold to him by the plaintiff was in the defendant at the time they were taken by him, and that consequently the rule must be made absolute to enter a nonsuit.

Per cur.—Rule absolute.

BANNON V. FRANK.

Covenant—Breach—Eviction—Damages.

Upon an action brought for damages arising from breach of a covenant in a conveyance of land, the declaration alleged that the defendant conveyed the land (naming it) to one C. in fee, covenanting that he was seised in fee without any matter to charge, change, defeat or encumber the same, that C. mortgaged to the plaintiff; it was proven at the trial that in consequence of the defect of title, C. refused to pay his mortgage, upon which there was \$582 79 due. The defendant pleaded *non est factum*, and brought 1s. into court in satisfaction of the breach. A verdict being entered for \$686 76,—upon motion to reduce it to nominal damages,

Held, that no eviction having taken place, the plaintiff was only entitled to nominal damages. The decisions of this court in *Graham v. Baker*, 10 U. C. C. P. 427, and *Snider v. Snider*, 13 U. C. C. P. 157, were adhered to.

The writ in this cause was issued on the 11th of August, 1863.

The declaration was in covenant on a deed dated the 11th of October, 1855, made between the defendant and wife, and one Samuel Curtis, consideration £250, whereby defendant conveyed to Curtis, his heirs and assigns, the north half of lot No. 5, in the 3rd concession of Alnwick, to hold in fee. And defendant covenanted with Curtis, his heirs and assigns, among other things, that he was seised in fee of the land, without any matter or thing to charge, change, encumber or defeat the same, and also that he had in himself good right and authority to convey the same to Curtis in manner aforesaid. Under which indenture Curtis entered on the day of its date into the premises, and afterwards on the 11th of October, 1855, by a certain indenture, Curtis mortgaged the premises in fee to plaintiff for the consideration of £250, with a proviso for redemption on payment of £250 and interest. *Habendum* to plaintiff, his heirs and assigns forever, by virtue of which deed plaintiff became seised of all the estate in the lands which Curtis had. The first breach assigned was that defendant was not at the time of making the deed to Curtis seised of an estate in fee in the said lands. The second breach was that at the said time defendant had not good right and full power and absolute authority to sell and convey the said lands in manner and form aforesaid. By means whereof the lands were of much less value, to wit, by £200, to the plaintiff than they otherwise would be, and he had not been able to sell, and had been prevented and hindered from selling the same so beneficially or for so large a price as he might otherwise have done, and had been unable to raise money on the said lands by way of mortgage as he otherwise might have done, and had been refused a loan of money on the said lands on account of the invalidity of the title thereto. Plaintiff claimed £500.

The defendant pleaded first *non est factum*. Second the defendant brought into court 1s. and said that sum was enough to satisfy the plaintiff for every breach of the covenant in respect thereof.

Issue was taken on the first plea. The replication to the second plea was that the sum paid into court was not sufficient to satisfy the claims of the plaintiff in respect of the matters to which the plea was pleaded.

At the trial before *Morrison*, J., at the fall assizes of 1863, for the united counties of Northumberland and Durham, after proving the conveyance of the lot from the defendant to one Curtis, and a mortgage in fee from Curtis to himself, the plaintiff proved by Curtis that he owed \$582 79 on the mortgage, which he had not paid to the plaintiff, as the defendant's title was bad, he added he would pay it when the title was made good. On cross-examination he stated that he went into possession of the land a few days after he got the deed from defendant (11th of October, 1855,) and no action had been brought against him to turn him out of possession. Another witness, George Hardcastle, stated he knew the lot and would have given £300 for it.

A verdict was entered for the plaintiff for \$686 76, with leave to defendant to move to enter a verdict for nominal damages or to enter a verdict for the defendant on the plea of payment of money into court.

In Michaelmas Term last *J. H. Cameron*, Q. C., moved, pursuant to leave reserved, for a rule *nisi* to reduce the verdict to nominal damages, or to enter a verdict for the defendant on the plea of payment of money into court. This rule was enlarged from time to time until last term, when

Nanton shewed cause and contended that there was in the breach of the declaration a substantive cause of action shewn, and also an averment of the facts from which damages were distinctly shewn, and these facts were not denied. That the evidence of Curtis shewed he would not pay because the title was defective, and the other witness spoke of being willing to give £300 for the place if the title had been good. He therefore contended the court could not say that not more than a shilling damages had been sustained and therefore the verdict given must stand. He referred to *Graham v. Baker*, 10 U. C. C. P. 426.

C. S. Patterson, contra, contended that plaintiff could recover only for the damages proven to have been sustained at the time the action was brought; that the covenant was a continuing one, and when plaintiff sustained any more damages than 1s. he could bring an action therefor. He also argued

that defendant could not plead to the special damages, and the only advantage in inserting them in the declaration, was to enable plaintiff to give in evidence matters of that kind. As to the evidence, it does not shew what the defect in the title is, and the mortgagor certainly could not refuse to pay if plaintiff had sued him for the money payable on the mortgage. He referred to *Kennedy v. Soloman*, 14 U. C. Q. B. 623; *King v. Jones*, 5 Taunton, 418; *Dart. on Vendors*, 407; *Sedgwick on Damages*, 2 Ed. 174; *Powell on Evidence*, 221; *Scriver v. Myers*, 9 U. C. C. P. 255.

RICHARDS, C. J.—In *Graham v. Baker*, 10 U. C. C. P. 427; and *Hodgins v. Hodgins*, 13 U. C. C. P. 146, I have expressed my views at some length, in relation to the question of damages on a breach of covenants running with the land, of the character of those set out in the declaration in this cause. In the cases of *Scriver v. Meyers*, 9 U. C. C. P. 255, and *Harry v. Anderson*, 13 U. C. C. P. 480, there are observations made as to the effect of these covenants and the nature of a breach of them. *Snider v. Snider*, in the same volume of the C. P. Reports, at p. 157, is to the same effect as *Graham v. Baker*.

I cannot distinguish in principle this case from those already decided in this court, in which it was held the plaintiff was only entitled to nominal damages. It is true there are special damages laid in this declaration, but none are in fact shewn in evidence; for *Curtis* (the mortgagor, who stated he would not pay his mortgage, on which over \$580 was due, until the title was made good, which he said was bad,) does not mention what the defect of title is, nor that, in truth, there are any damages that have arisen or will be likely to arise from it. He stated he had been in possession of the mortgaged premises since 1855, and no action had been brought against him to turn him out of possession. He does not shew that there is any probability that such an action ever will be brought; for anything this witness says, the defect of plaintiff's title may be of a merely formal character. As to his refusing to pay the mortgage money, I apprehend if either ejectment or covenant were brought against him, he would be estopped from setting up any such

defence as a defect of title, which arose before he conveyed to plaintiff. Another witness stated he *would* have given £300 for the lot; he did not state any defect of title, nor say what he would then give for it, nor if, except by implication, it was diminished in value from any defect in the title.

I see nothing to warrant in this case, more than in the others decided in this court on the same question, the recovery of anything beyond nominal damages. As, however, we were pressed by plaintiff's counsel on the argument, with the view that the evidence given by the witnesses was not as full as he expected them to have given on the subject of damages, and we might possibly be doing an injustice by directing a verdict for defendant on the plea, paying the 1s. into court, we will give the plaintiff the opportunity of bringing another action if he desires to do so.

If the plaintiff elects to take a non-suit on or before the first day of next term, the rule will be made absolute to enter a non-suit; otherwise it will be absolute to enter a verdict for the defendant, on the plea of payment into court.

Per cur.—Rule accordingly.

THE CORPORATION OF WELLINGTON V. WILSON ET AL.

County council—Road lying between two townships—Jurisdiction over—Municipal Institutions Act.

The first count of the declaration alleged that the defendants wrongfully cut away, removed and destroyed a bridge *belonging to the plaintiffs*, to wit: the bridge across the Grand River, on the line of road and public highway between the townships of A. and G. in the county of W.

The second count alleged that there was and had been a line of road and public travelled highway between the townships of A. & G. which crosses the Grand River in the county of W., such road being the line of road allowance between the townships aforesaid, and in order that the road might be travelled upon, the plaintiffs in discharge of their duty, caused a bridge to be erected across the said river where such bridge crosses the line of road, &c., and thereby facilitated the use by the ratepayers of the said county and others of the said line of road and highway. Yet the defendants, well knowing the premises, but contriving to injure, &c., the plaintiffs, wrongfully and injuriously injured and cut down, &c., said bridge, and by means thereof it became the duty of the plaintiffs to rebuild the said bridge, and in performance of such duty plaintiffs have expended divers large sums of money, &c., &c.

The first count was demurred to on the grounds that the plaintiffs were not authorised by law to be, and were not the owners of the said road and bridge, and were not entitled by law to maintain any action for the wrongs complained of, but that the remedy should have been by indictment not by action.

The second count was demurred to because it was not shewn that the road or bridge had been assumed by plaintiffs by by-law, or how the duty to rebuild the bridge arose, or that it was their duty to do so, and that they were not bound to do so.

Two defendants also pleaded that the plaintiffs did not assume the road by by-law. To this the plaintiffs demurred on the grounds that the plea raised an immaterial issue. That it attempted to put in issue matter not stated in the second count; that the defendants being wrong doers the absence of a by-law was no defence; that the plaintiffs had a property in and duty respecting the bridge without a by-law; that the absence of a by-law, if otherwise necessary, could not be taken advantage of by the defendants;

Held, 1st. That by sec. 339 of the Municipal Act, the plaintiffs have exclusive jurisdiction over the bridge in question, and not a mere naked power, and having jurisdiction the common law (irrespective of the statute) would impose upon them the duty of repairing it, they could therefore maintain the action although sec. 336, which vest the soil and freehold of all highways in cities, towns, villages and townships in their respective municipalities, does not mention counties.

2nd. That the allegation in the first count, that the bridge *belonged to the plaintiffs*, was truly stated.

3rd. That the plaintiffs may have become the absolute proprietors of the bridge by purchase from a road company, and there was nothing to shew that they did not claim by such title in the pleadings, and that their title was sufficiently shewn in the pleadings.

The first count of the declaration stated that the defendants wrongfully and injuriously cut away, removed and destroyed a bridge belonging to the plaintiffs, to wit, the bridge across the Grand River, on the line of road and public highway between the townships of Amaranth and Garafraxa in the county of Wellington.

The second count stated, that heretofore, and at the time of the grievances hereafter mentioned, there was and from thence hitherto hath been a line of road and public travelled highway between the townships of Amaranth and Garafraxa in the county of Wellington, such highway being the town line or line of road allowance between the townships aforesaid, and such line of road crosses the river called the Grand River in the said county, and that the line of road might be travelled upon and used by the ratepayers and others, inhabitants of the said county, and others, the subjects of Her Majesty; the plaintiffs, in the performance of their duty in that behalf, caused to be erected and constructed a bridge across the said Grand River, where such bridge crosses the line of road, and so removed the interruption caused by such river to the said road, and thereby facilitated the use by the ratepayers of the said county and others of the said line of road and highway, and the plaintiffs in the erection and con-

struction of the aforesaid bridge thereon, expended and disbursed divers large sums of money belonging to the corporation of the county of Wellington, and collected and derived from the rates and assessments imposed upon the ratepayers and other inhabitants of the said county, and from other lawful sources in that behalf. Yet the defendants well knowing the premises, but contriving and wrongfully intending to injure the plaintiffs, wrongfully and injuriously injured and cut down, removed and carried away the said bridge, and thereby obstructed the said road and highway, and by reason thereof the plaintiffs became liable to rebuild the said bridge, and to expend thereon divers other moneys of the said corporation, and it thereupon also became and was the duty of the plaintiffs to reconstruct and rebuild such bridge; and the plaintiffs in the discharge and performance of such duty, have paid and expended in the rebuilding and reconstructing of such bridge, divers large sums of money, and are liable to expend and pay divers other large sums of money, and by means of the premises the plaintiffs have been otherwise greatly injured.

The fourth plea of the defendants, Wilson and Edsall, to the second count was, that the plaintiffs did not, by any by-law, assume the road or bridge.

The fourth plea of the defendant Currie, to the second count, was precisely the same.

The defendants, Wilson and Edsall, demurred to the declaration, and stated the following grounds of objection to the first count:

That the plaintiffs are not authorised by law to be, and are not owners of the bridge, or of the road, nor are they entitled by law to maintain any action for the wrongs in the first count alleged. That the remedy for the wrongs complained of is by indictment or information, and not by action at the suit of the plaintiffs.

The following were the objections to the second count:

It was not shewn the road or bridge had been assumed by the plaintiffs by by-law, or how the alleged duty or liability to build or rebuild the bridge arose, or that it was in law their duty so to do, or that they had any legal right so to do or to expend thereon the moneys alleged to have been

expended ; that the plaintiffs were not by law bound to build or rebuild the bridge ; that the road and bridge are not, nor is either of them, vested by law in the plaintiffs, and that the remedy for the wrong complained of is by indictment or information, and not by action at the suit of the plaintiffs.

The defendant Currie also demurred to the declaration, and assigned the same grounds of exception to each of the counts.

The plaintiffs demurred to the fourth plea of the defendants, Wilson and Edsall, and stated the following grounds of demurrer to the same :

1st. That the plea raised an immaterial issue.

2nd. That it attempted to put in issue matter not stated in the second count.

3rd. That the defendants being wrongdoers, the absence of a by-law could not be a defence.

4th. That the plaintiffs had a property in and a duty with respect to the bridge without a by-law.

5th. That the absence of a by-law, if otherwise necessary, could not be taken advantage of by the defendants.

The plaintiffs also demurred to the fourth plea of the defendant Currie, and assigned the same causes of demurrer as to the fourth plea of the other defendants. The parties respectively joined issue on the demurrers.

Crooks, Q. C., for the plaintiffs, contended that they had an interest in the subject of the suit, and were entitled to maintain it. He referred to *Fisher v. Vaughan*, 12 Q. B. U. C. 55 ; *Upper Canada Consolidated Act*, ch. 54, secs. 313, 314, 315, 327, 331, 335, 339, 340, 341, 343 ; *Gibbs v. The Trustees of the Liverpool Docks*, 3 H. & N. 164 ; *Woods v. The Municipalities of Wentworth and Hamilton*, 6 C. P. U. C. 101 ; *McKinnon v. Penson*, 8 Exch. 319 ; *S. C. in Exch. Cham.* 9 Exch. 609 ; *Brown v. Municipal Council of Sarnia*, 11 Q. B. U. C. 87 ; *McDowell v. The Great Western Railroad Company*, 5 C. P. U. C. 130 ; *Huist v. Buffalo and Lake Huron Railroad Company*, 16 Q. B. U. C. 299 ; *Campbell v. The Great Western Railroad Company*, 15 Q. B. U. C. 498 ; *Woolrych on Ways*, 326, 338, 340 ; *Harrison v. Parker*, 6 East. 154.

C. S. Patterson and *John Read* contra, contended that sec. 336 of the Municipal Act vested the soil of all highways in cities, towns, villages and townships in their respective municipalities, but counties are not mentioned. Unless the plaintiffs can shew a title to the road or bridge they cannot maintain an action for the injury to them, the remedy must be by a public prosecution. *Davis v. Petley*, 15 Q. B. 276, 1 Hawk. P. C. 700, c. 32. Same reference in Hawk. b. 1, chapters 76-77, fol. edn.

ADAM WILSON, J.—The sections of our Municipal Act must be specially examined to ascertain the express powers which have been conferred upon county corporations.

The first count describes the bridge as belonging to the plaintiffs, and as crossing the Grand River on the line of road and public highway, between the townships of Amaranth and Garafraxa, in the county of Wellington.

The second count describes it in nearly the same manner, and adds that the highway between the townships is “the town-line, or line of road allowance between the townships.”

The demurrers to the declaration raise the question, whether, under any circumstances, the plaintiffs, as a county corporation, can have a bridge belonging to them “on the line of road and public highway between two townships in the same county,” which they have not assumed by by-law? And if they cannot, then whether such a title must, as a proper allegation of pleading, be set forth in the declaration?

By sec. 339 of the Municipal Act, it is provided that the county council shall have exclusive jurisdiction over all roads and bridges lying *within any township* of the county, and *which the council by by-law assumes as a county road or bridge*; and also over all bridges across streams separating two townships in the county. And over “every road or bridge dividing different townships,” &c.

From this it would appear to be necessary for the county council to pass a by-law assuming a road or bridge as a county road or bridge, only when the road or bridge is *within any township*. In all cases of roads or bridges dividing different townships in the county, the county council

have the exclusive jurisdiction, by authority of the statute, without any by-law whatever.

Now, here is a case in which the bridge is alleged to be "on the line of road or public highway *between two townships*, in the county of Wellington," and therefore within the very words of the statute, which confer on the plaintiffs "the exclusive jurisdiction" over it.

This, therefore, being a bridge within the jurisdiction of the county, the county council may, under sec. 331, make or repair the same, or place a toll upon it to defray its expense or repair, or grant to companies the right to construct it, or grant the tolls upon it to any person or company for building it; see also s. 342.

It may be doubtful whether sec. 337 applies to *county* roads, as the language is, every *such* road; and *such* may, perhaps, be confined only to the roads mentioned in sec. 336, which does not specify county roads.

But, apart from sec. 337, which imposes the burden of repairing the roads within the respective municipalities upon the municipalities in which they are situated; the common law duty would apply to all such bodies, to repair the roads which are within their jurisdiction, and for which they can raise the funds required for the purpose.

I have no doubt, therefore, that these plaintiffs could be indicted if *this* bridge were out of repair; but the present question is whether they can, as plaintiffs, maintain this action, and allege the bridge "to belong to them?"

The statute does not by sec. 336, which vests every public road, street, bridge, or other highway, in a city, township, town or village, name a *county* at all—probably an unintentional omission.

The county has clearly the "exclusive jurisdiction," and under this, the county may exercise all the very extensive powers above enumerated under sec. 331. If the county can grant to road or bridge companies permission to commence or proceed with roads or bridges within its jurisdiction, whose road or bridge would it be when it was finished? No doubt it would be the road or bridge of the company, and they might maintain a civil action for any injury done to it. If this be so, as respects a company, why should not the like

rule prevail as to the county, if the county do the work, when the county has not merely a naked power over the subject, but has an interest, "the exclusive jurisdiction" as well?

But, while the defendants insist that this bridge cannot belong to the plaintiffs, how can we say as a fact whether it can or cannot?

By the Joint Stock Companies' Act, U. C. c. 49, s. 68, the plaintiffs may have bought this bridge from a joint stock company, in which case the purchasers are *to stand in the place and stead of the company*; and unquestionably, then, the bridge would *belong* to the plaintiffs. When, therefore, the defendants demur to the declaration, and say that under no circumstances can a *county* own a bridge, they are going too far, unless it be necessary that the county should set out its title in the declaration, with far greater particularity than is ever adopted.

But why should this be more necessary for a county than for any other municipality, which might equally purchase a road? It is a general rule of pleading, that title must always be shewn when a claim is made, or a liability is sought to be imposed.

The common count for goods sold and delivered, must shew *title* in the plaintiff to sue, and this is done by alleging that the goods were sold and delivered "by the plaintiff."

Title is shewn to goods and chattels, by stating them to be the goods and chattels "of the plaintiff," or that he was "lawfully possessed of them as of his own property," and so as to real property.

The title here is sufficiently shewn, unless the law be that the plaintiffs cannot under any circumstances be possessed of a bridge. If it be that a bridge may or may not belong to the plaintiffs, the plaintiffs need not anticipate all this in their declaration; as in the case of *Simpson v. Ready*, 12 M. & W. 738, where it was held that although the action was given only to a *burgess*, the plaintiff need not allege in his declaration that he was a *burgess*; it was a matter of evidence only.

The *soil* and *freehold* may be vested in the Crown, but the "exclusive jurisdiction" which the county has in its own

roads, and highways and bridges [excluding those which may be acquired by purchase from road companies], with the other very great powers which have been expressly conferred upon such bodies, must confer upon the county something more than the mere naked possession.

As against a wrong-doer, mere possession as to private property, is a sufficient title; and we think that this is also applicable to the present case.

In *Harrison v. Parker*, 6 East. 154, the plaintiff, who sued the defendant for destroying his bridge and carrying away the materials, had only a licence to build the bridge from the owner of the soil, he had no right in the soil itself; he had no *exclusive* right in the soil, and it was held, he might sue for the carrying away of the materials, but no decision was given on the other point.

The case of *McKennon v. Penson* only decides that as a civil action is not maintainable at law against a county in England, for non-repair of a county bridge, because it is not a corporation, and justice could not be done towards the inhabitants, that an action would not lie, under the statute, against the surveyor of the county.

This case, however, shews that in this country, as the county is a corporation, that such an action would lie against it.

The decision in *Dimes v. Petley*, 15 Q. B. 283, is an authority in favour of the plaintiffs. There it is laid down on a motion for judgment *non obstante veredicto*, "that if there be a nuisance in a public highway, a private individual cannot of his own authority abate it, unless it does him a special injury; and he can only interfere with it as far as is necessary to exercise his right of passing along the highway; * * * * and he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if avoiding it he might have passed on with reasonable convenience." As this is the law even as to nuisances, how much more should property on a part of a highway be protected, which is not a nuisance, but convenient for and essential to the public travel. I think that the "exclusive jurisdiction" granted to the plaintiffs, of the bridge in question, with the other very great powers which

have been conferred upon them by the legislature, sufficient to pass title to a grantee, do vest in them an interest in this bridge, beyond a mere naked power.

That their interest is truly stated to be as alleged, a bridge "belonging to the plaintiffs."

And that as the plaintiffs may become the absolute proprietors of a bridge by purchase from a road company, there is nothing in the pleadings which shews that they do not claim by such a title.

And there is no rule of pleading which requires them to set out their title with greater particularity than they have done.

The Chief Justice and my brother Wilson are not responsible for all the reasons I have expressed in the opinion I have given, but they agree with me that there should be judgment for plaintiffs on demurrer.

Per cur.—Judgment for plaintiffs.

REGINA V. RICHARD ROW.

Perjury—Conviction for—Magistrates for county—No jurisdiction within the limits of a city situate therein—Con. Stat. U. C., ch. 112.

The prisoner being indicted for perjury in giving evidence, upon a charge of felony against one E. G., it appeared that the felony, if committed at all, was committed in the county of Middlesex. The justices before whom the examination took place entertained the charge and examined the witnesses within the city of London. The defendant's counsel objected at the trial that the justices being justices of the county of Middlesex, had no jurisdiction, sitting in London, to examine into an offence committed outside of the limits of that city. The learned judge overruled the objection, reserving the case under ch. 112 of Con. Stat. of U. C. Upon motion, *Held*, that the conviction was illegal. It was therefore reversed. *Held*, also, that Imperial Stat. 28 Geo. III., ch. 49, sec. 1, is local in its character, and is not in force in this province.

Case reserved under chapter 112 of the Consolidated Statutes for Upper Canada by *Morrison, J.*, at the last spring assizes, holden at London, in and for the county of Middlesex, as follows:

At the last assizes holden at the city of London, in and for the county of Middlesex in Upper Canada, Richard Row was tried and convicted before me upon an indictment for perjury under the following circumstances.

In the month of November last an information in writing and upon oath of the said Richard Row, was laid by him before two justices of the peace for the county of Middlesex, charging one Elliott Grieve with a certain felony alleged to have been committed in the township of Westminster in the said county. The said Elliott Grieve was brought before the said justices and several other justices of the peace of the said county, and examined upon the said charge. The said felony, if committed at all by the said Elliott Grieve, was committed in the said county outside the city of London. The said examination took place within the limits of the city of London aforesaid, and the said Richard Row was then and thereon, and at said examination, and within the limits of the said city, sworn and examined before the said justices as a witness in support of the said charge, and his deposition was then and there taken in writing by the said justices. The perjury alleged in the said indictment against the said Richard Row, is assigned on a statement made by the said Richard Row in support of the charge against the said Elliott Grieve while under examination as aforesaid before the said justices, and which statement is contained in the written deposition aforesaid.

At the trial of the said Richard Row, after the evidence for the prosecution was concluded, the defendant's counsel objected that the said justices had no jurisdiction or authority to administer the oath aforesaid to the said Richard Row on such examination, inasmuch as they were then sitting within the limits of the city of London where, as justices of the county of Middlesex, they had no jurisdiction, and for that reason the said Richard Row could not be convicted on the said indictment.

The learned judge overruled the objection, and the jury having convicted the defendant, sentenced him to three months' imprisonment for the said offence, but reserved the question for the consideration of the justices of the Court of Common Pleas for Upper Canada under chapter 112 of the Consolidated Statutes for Upper Canada, whether the legal objection above mentioned, taken by the defendant's counsel, was entitled to prevail, and requested the opinion of the said justices upon the said question.

S. Richards, Q. C., for the Crown, referred to the Municipal Institutions Act, ch. 54, secs. 361, 362, 365, Con. Stat. Canada, ch. 102, secs. 20, 24 & 25; 28 Geo. III., ch. 49, sec. 4.

Harrison, contra, referred to Paley on Convictions, 4 edn. p. 16, and 28 Geo. III., ch. 49; 16 Vic. ch. 179; *Regina v. Rawlings*, 8 C. & P. 439; *Regina v. Guardians of Holborn Union*, 6 E. & B. 715; *Regina v. Justices of East Looe*, 8 Jur. N. S. 1128.

RICHARDS, C. J.—We think the objection taken to the conviction at the trial ought to prevail, and that the justices of the peace of the county of Middlesex acting in the matter therein referred to, had no jurisdiction to administer oaths to or examine witnesses within the city of London, in the proceedings then being had before them, and in which the alleged perjury was committed.

We are also of opinion that the Imperial Statute 28 Geo. III., ch. 49, sec. 4, is local in its character, and is not in force in this province.

We therefore *reverse* the conviction of the said Richard Row in the said case, and the judgment given thereon, and order an entry to be made on the record that in the judgment of the justices of the Court of Common Pleas for Upper Canada the said Richard Row ought not to have been convicted.

Per cur.—Conviction reversed.

REGINA V. WILLIAM CARSON.

Forgery—Indictment for—22 Vic. ch. 94—Con. Stat. Canada, ch. 99—Con. Stat. Upper Canada, ch. 112.

In an indictment for forgery the third count alleged that the prisoner afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off a certain other forged instrument in writing, which said last mentioned forged instrument in writing was as follows :

“ Glandford, January 29, 1864.

I, John Hostine, do agree to William Carson, of Warstead, Plymp, the full rite and privilege of all the white oke and elm and hickory lying and standing on lot 26, south part, on the third concession Plymp, for the sum of thirty dollars, now paid to Hostine by Carson, the receipt whereof is hear by me acknowledged.

JOHN HOSTINE.”

With intent thereby to defraud, he, the said William Carson, at the time he so uttered and published the said last mentioned forged instrument as aforesaid, well knowing the same to be forged against the form of the statute, in such cases made and provided, and against the peace of our lady the Queen, her crown and dignity. The jury having convicted the prisoner, his counsel moved in arrest of judgment on the grounds—

- 1st. That the third count (set out above) did not give the instrument, alleged to be forged, any name, description or designation.
- 2nd. That the instrument set out in the third count was insensible; and that there were no averments explaining it.
- 3rd. That the third count concluded *contra formam statuti*, and that there was nothing in it to shew that the offence was against any statute.
- 4th. That the count was otherwise bad, and bad at common law, and that there was no allegation of intent to defraud any person, and that no judgment could be pronounced upon it.

The learned judge having overruled the objections—upon a case reserved for the opinion of this court under ch. 112 of Con. Stat. of U. C.

Held, 1st. That the instrument forged being set out *in hæc verba* in the indictment, the description of its legal character would be surplusage and unnecessary.

2nd. That under sec. 29 of Con. Stat. of Canada, ch. 99, it is not necessary to allege an intent to defraud in an indictment for forgery.

3rd. That the averment of the offence being *contra formam statuti* was of no importance, for if the offence was one against the statute it was sufficiently proven, and if not against the statute, but an offence at common law, the allegation was immaterial and unnecessary to be proven.

4th. That the instrument might be construed as an agreement or contract to sell the timber or a receipt for the payment of money, and in either case came within the stat. 22 Vic. ch. 94.

The following was a case reserved under cap. 112 of the Con. Stat. U. C., by *Morrison*, J., at the last spring assizes, holden at Sarnia, in and for the county of Lambton:

The prisoner was indicted for perjury, the third count was as follows:—And the jurors aforesaid, on their oath aforesaid do further present, that the said William Carson, afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off, a certain other forged instrument in writing, which said last mentioned forged instrument in writing was as follows, that is to say:—"Glandford, January 29, 1864. I John Hostine do agree to William Carson of Wanstead Plymp the full rite and privilege of all the white oke and elm and hickory lying and standing on Lot 26 south part on the 3 concession Plymp for the sum of thirty dollars now paid to Hostin by Carson the receipt whereof is hear by me aknowledged.

"The boundry line to
extend back as far

as McWeans."—with intent thereby to defraud; he (the

"JOHN HOSTINE."

said William Carson,) at the time he so uttered and published the said last mentioned forged instrument as aforesaid, well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

The jury convicted the prisoner (the said William Carson) on the third count of the said indictment, and the verdict of guilty was entered on that count only.

Becher, Q. C. counsel for the prisoner, moved in arrest of judgment on the following grounds and objections :

1. That the third count did not give the instrument alleged to be forged any name, description, or designation.

2. That the instrument set out in the said third count is insensible, and that there are no averments explaining it.

3. That the third count concludes *contra formam statuti*, and that there is nothing in it to show that the offence is against any statute.

4. That the count is otherwise bad, and bad at common law, and there is no allegation of intent to defraud any person, and that no judgment can be pronounced on it.

The learned judge overruled the objections, and sentenced the prisoner to four years' imprisonment in the penitentiary ; but reserved the question for the consideration of the justices of the Court of Common Pleas for Upper Canada, whether the objections above set forth, taken by the prisoner's counsel, or any of them, were entitled to prevail. And requested the opinion of the said Justices upon the said question.

S. Richards, Q. C., for the Crown, cited *Regina v. Williams*, 2 Denison, 61 ; *Regina v. Smith*, 8 Jur. N. S. 572 ; S. C. 6 L. T. N. S. 300 ; *Regina v. Moody*, 8 Jur. N. S. 574 ; S. C. 6 L. J. N. S. 301 ; *Regina v. Fitch & Howley*, 8 Jur. N. S. 624 ; S. C. 6 L. T. N. S. 256 ; Con. Stat. Can. cap. 94, sec. 9 ; *Regina v. Hill*, 2 Cox, C. C. 246 ; *Regina v. Newton*, 2 Moody, C. C. 59 ; *Regina v. Williams*, 2 C. & K. 51 ; *Bristow v. Wright*, 2 Sm. L. Ca. 570.

Becher, Q. C., contra, referred to section 9 of the Forgery Act, ch. 94, Con. Stat. of Canada ; *Regina v. Barton*, 1 M. C. C. 141 ; *Regina v. Wilcox*, 1 R. & R. 50 ; Woolrych's Crim. Law, 681-2-3.

RICHARDS, C. J.—The third count of the indictment is all that it is necessary for us to consider, as it was on that count the prisoner was convicted.

The 9th section of 22 Vic. cap. 94, of the Statutes of Canada, the Forgery Act, as far as it is necessary to refer to the same for the purposes of this argument, is to the following effect: "If any person, with intent to defraud any person, offers, utters, disposes of, or puts off, knowing the same to be forged, any deed, bond, writing obligatory, * * * * or any acquittance or receipt, either for money or for goods, or any accountable receipt either for money or goods, *as* for any note, bill, or other security for payment of money, or any warrant, order or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for the payment of money, or any contract, promise or agreement, such offender shall be guilty of felony, and shall be imprisoned in the Provincial Penitentiary not less than four, nor more than ten years."

The instrument is set out *in hæc verba* in the indictment. *Regina v. Williams*, 2 Den. C. C. 61; S. C. 20 L. J. M. C. 106, is an authority that when that is the case, the description of its legal character would seem to be surplusage.

As to the want of allegation of intent to defraud a particular person, Con. Stat. c. 99, s. 29, expressly provides that it shall not be necessary to aver such intent, in an indictment for forgery.

As to the averment that the offence was *contra formam statuti*, that allegation seems now to be of very little importance, so far as affects the position of the prisoner, if the offence is one against the statute, then I apprehend it is sufficiently proven, and if it is not against the statute, but is one at common law, the allegation seems immaterial and unnecessary to be proven.

Is this instrument, then, a contract, promise or agreement as it stands; without averments to explain what was intended, can it be so considered?

I think the instrument may well be considered a contract and agreement. The rule is, that we must make the instrument a binding and effective one, if we can; Addison, on Contracts, 1024. Suppose we transpose the words, and

read it in this way:—For the sum of thirty dollars, now paid to me, John Hostin, by William Carson, the receipt whereof is hereby by me acknowledged, I agree to give Carson the full right and privilege of all the white oak, elm and hickory lying and standing on the south part of Lot No. 26, in the third concession of Plympton.

I think we may well hold, when a person under his hand acknowledges a money consideration, for something which he is apparently to give in return, and says, I agree to you the full right to (say) all the cows in my stable; it is not straining words beyond reason to say that he assigns or transfers to the party paying the money, the cows then in his stable, or to hold that he means, I agree to sell you the cows. I think the language set out in this instrument may in the same way be construed as assigning to Carson the timber on the lot, or agreeing to do so, as the legal effect of such an instrument.

Besides, in construing an instrument like this, I have no doubt parol evidence would be admitted to explain the circumstances under which it was written, that is, the surrounding circumstances at the time it was written, and that would doubtless enable a reasonable meaning to be given to the whole, so as to make it a binding contract and agreement.

But, should it fail as an agreement or contract, the modern cases fully warrant us in holding that it is a receipt for the payment of money, and in that view, clearly comes within the statute

We think the conviction is good, and ought to be sustained.

Per cur.—Conviction sustained.

IN RE. KELLY (RELATOR) V. MACAROW.

Municipal elections—Quo warranto.

The court discharged a rule for leave to file an information to disturb a person in the exercise of an office to which he was elected for one year, without opposition; the person applying for the leave having been present at such election, and having then made no objection to the person elected, and the application not having been made within the time prescribed by the Municipal Act.

In Hilary Term last, *Harrison* obtained a rule calling on Daniel Macarow, of the city of Kingston, Esquire, to shew

cause, on the first day of Easter Term, why an information in the nature of a *quo warranto* should not be exhibited against him, at the instance of Thomas Fitzroy Kelly, as relator, in the name of the Master of the Crown Office, or otherwise as the court might direct, on behalf of Her Majesty the Queen, to shew by what authority he claimed to exercise the office of an alderman for Ontario Ward, in the corporation of the city of Kingston, upon the ground that the said Daniel Macarow had not, at the time of his election, in his own right or in the right of his wife, as proprietor or tenant, freehold or leasehold property rated in his own name or in that of his wife, on the last assessment roll of the said city of Kingston, to at least the value following: freehold, to one hundred and sixty dollars per annum; or leasehold, to one hundred and sixty dollars per annum; [Note—This was admitted to be a mistake, and that it ought to have been, or leasehold, to the value of three hundred and twenty dollars per annum]; and was not otherwise qualified to be elected to the said office.

The objection to the qualification was, that though he was rated on the assessment roll for 1863, as lessee of three separate buildings, the aggregate rent of which amounted to \$344; as to one of these buildings, the rental of which was \$160 per annum, he had ceased to be the lessee of it after the 10th of May, 1863, from which time it had been in the possession and occupation of another person as tenant, and the said Macarow had not any interest therein.

From the statement of Mr. Kelly, it appeared that the municipal election for Ontario Ward was held on the 4th of January last, and that Daniel Macarow and James Baker were elected and returned as aldermen, without any poll being demanded, and two councillors were also elected at the same time, without any poll being demanded, there having been no opposition publicly expressed to the nomination and election of the said aldermen and councillors. Kelly also stated that Macarow, just before the election, asked him to second his nomination for alderman, but he refused so to do, and did not consent to Macarow being elected as aforesaid (though he was doubtless present at such election, and it does not appear that he openly expressed any

dissent to such election); he further states that before and at the time of the election of Macarow, he was not aware of his want of qualification for the office.

During the term, *S. Richards*, Q. C., shewed cause, and contended that the court would not now allow a person who was present at an election, to take proceedings to oust a person elected without opposition; the time for making the application under the Municipal Institutions Act having expired. He also contended that the legislature having provided a more convenient, speedy and less expensive remedy, to test the right of an alderman to hold his office, than the application for leave to file an information, the court would not grant such leave; he further urged that Mr. Kelly was not, under the statute, qualified to be a relator, because he was not a candidate at the election, or an elector who gave or tendered his vote thereat; he also argued that as it appeared from the affidavits filed, that Macarow, after giving up the house on Queen street, the rental of which was \$160, had before the election *bona fide* become the tenant of another house on Wellington street, at a rental of \$180 a year, which he then held; so that at the time of the election he was *bona fide* possessed of leasehold property of the yearly value of \$320 per annum or more. He referred to Reg. ex rel. White v. Roach, 18 U. C. Q. B. 226; Cole on Quo Warranto, 165; Municipal Institutions Act, Con. Stat. U. C. ch. 54, sec. 127 and 128. He also urged that it was not shewn there was any other person in the municipality qualified to be elected alderman, and under sec. 72 of the act just referred to, the only qualification necessary was that of an elector which the papers filed clearly show Macarow to have possessed.

Sir *H. Smith*, Q. C., contra, contended that Macarow was clearly not qualified, and that from the first his qualification was colourable. He referred to Reg. ex rel. Dexter v. Gowan, 1 Practice Reports, 104. He urged that as Kelly did not know of the want of qualification, it could not be urged that he ought to be estopped from bringing it forward now; that merely not bringing it forward could not properly be considered as acquiescing in the election of

the person proposed. He strongly urged that as the proceeding could not be taken under the statute, because there was no other candidate, no other elector who voted or offered to vote at that election, the court ought to permit the information to be filed. He referred to *Reg. ex rel. Coleman v. O'Hare*, 2 U. C. Practice Reports, 18, as direct authority in his favour on these points.

He argued that the facts developed by the affidavits, shewed that the party complained against had been from year to year renting houses, not for the purpose of occupying them, but to create a fictitious qualification, and that it was of great importance that only duly qualified persons should be allowed to sit in the city councils, particularly as these corporations had such extensive powers of running into debt; that the courts ought to encourage applications to turn disqualified persons out of the municipal councils.

RICHARDS, C. J.—We think this rule ought to be discharged. Looking at the course of legislation on the subject, we are of opinion that we exercise a wise discretion, and carry out the obvious intention of the legislature, when we refuse to grant leave to file an information to disturb a person in the exercise of an office to which he was elected without opposition, and to which he is only elected for one year, when the person now asking leave to file that information was present at such election, and did not then object to the election of the person now complained against.

On referring to 12 Vic. ch. 81, sec. 146, and the present Consolidated Municipal Act, sec. 127, it will be seen that the legislature, instead of extending the class of persons who were allowed to become relators under the act has rather limited them. Under the former act, a summons in the nature of a *quo warranto* might issue at the instance of any relator having an interest as a candidate or voter in any election; whilst under the present act, any candidate at the election, or any elector *who tendered his vote thereat* may become a relator.

The fact that the legislature has provided a cheap, speedy and convenient mode of trying these elections, and the right of parties elected to hold their seats, is a strong

argument why we should not grant leave to parties to resort to the more expensive and inconvenient mode which existed before the passing of our municipal acts. As a general rule, we think if we encouraged proceedings of this character, in this form, we should be doing that which it was the intention of the legislature should not be done at all, or if done, should be carried out in the way provided by the Municipal Act.

Without going so far as to decide that in no case would we grant leave to a party to file an information when there has been an improper election, yet looking at the judgment in the Court of Queen's Bench, Reg. Ex. Rel. White v. Roach, 18 U. C. Q. B. 226, I think it may be considered the general practice of both courts to confine the parties aggrieved to the relief that can be obtained under the statute.

It is urged that when a disqualified person has been elected without opposition, the Municipal Institutions Act makes no provision for proceeding under it to contest the election, because there would have been no other candidate, and no elector could have given or tendered his vote thereat. The obvious and ready answer is that the legislature thought if no elector took sufficient interest in the subject to propose a qualified person as a candidate, and to offer to vote for him, that it was scarcely necessary to provide that such an election should afterwards be contested because some elector had become awakened to the importance of having only properly qualified persons elected members of the corporation. If all the electors were so little inclined to assert their rights, as not to have a person nominated to oppose the disqualified person, it would not be unreasonable to suppose that the legislature intended that they should have until the next election to gather energy enough to exercise some little activity in relation to their municipal affairs.

We do not consider it necessary to go into the other points raised on the argument or suggested by the affidavits. I have not made up my mind that the qualification set up by Mr. Macarow is sufficient, the case of Reg. Ex. Rel. Dexter v. Gowan would seem to be against the qualification. And it does seem singular that he should have leased a house as long ago as January last, which it is not shewn that he has

occupied up to the present time. What was his position between the latter part of April, 1863, when he gave up the house on Queen Street, and the beginning of January, 1864, when he took the house on Wellington street? was he qualified to serve and be elected during that period? We think the rule should be discharged but without costs.

Per cur.—Rule discharged.

REGINA V. SCHRAM ET AL., AND REGINA V. ANDERSON ET AL.

Stat. 59, Geo. III., ch. 69—Enticing persons to enlist.

The defendants having been convicted of a misdemeanour under Imp. Stat. 59 Geo. III., ch. 69, for procuring and endeavouring to procure enlistments in this country for the army of the United States, upon motion for a new trial, *Held*, that that statute is in force in this province, and the conviction was sustained.

The defendants were indicted at the spring assizes, 1864, held at London before *Morrison, J.* The indictment alleged that Henry Schram, and Hayden Waters, on the fourteenth day of January, in the year of our Lord one thousand eight hundred and sixty-four, at the city of London in the county of Middlesex, in the province of Canada, the said province of Canada then and still being a colony belonging to and subject to Her Majesty, did unlawfully and wrongfully, and without the leave and license of Her Majesty for that purpose first, or at any time whatever, had and obtained under the sign manual of Her Majesty or signified by order in council or by proclamation of Her Majesty, hire, retain, engage and procure one John Talbot to enlist and to enter and engage to enlist and to serve, and to be employed in warlike and military operations by land as a soldier in the land service of and for and under and in aid of the United States of America, the said United States of America then and still being a foreign State, contrary to the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

The second count was similar, except that it alleged that the defendants procured J. T. to go and embark for the purpose of enlistment.

The third count was for procuring J. T. to enlist.

The defendants having been convicted upon this indictment, a rule was obtained for a new trial this term, which was argued by *Harrison* for the defendants, he referred to *Whicker v. Hume*, 4 Jur. N. S. 933.

S. Richards, Q. C., for the Crown.

RICHARDS, C. J.—The preamble to cap. 69, of 59 Geo. III. in effect recites that the enlistment or engagement of his Majesty's subjects to serve in war in foreign service, without his Majesty's license, may be prejudicial to and tend to endanger the peace and welfare of this kingdom, and that the laws then in force were not sufficiently effectual for preventing the same. [This statute was passed on the 3rd July, 1819].

By the second section of the statute it was provided—1st. That if any *natural born subject* of his Majesty, without the license of his Majesty, should take or agree to take or accept any military commission, or should enter into the military service as a commissioned or non-commissioned officer, or should enlist or agree to enlist to serve as a soldier or to be employed, or should serve in any warlike or military operation in the service of or for or in aid of any foreign prince, state or colony, either as an officer or soldier, or in any other military capacity.

2nd. Or if any *natural born* subject of his Majesty should, without such leave or license, accept or agree to take or accept any commission or appointment as an officer, or should enlist or enter himself, or agree to enlist or enter himself to serve as a sailor or marine, or to be employed or engaged, or should serve in and on board any ship or vessel of war or on board of any vessel used or fitted out or intended to be used for any warlike purpose in the service of or for or under or in aid of any foreign power, prince, state or colony.

3rd. Or if any *natural born* subject of his Majesty should, without such leave and license, contract or agree to go, or should go to any foreign state, country, colony or province, or to any place beyond the seas *with intent or in order to enlist*, or to enter himself to serve, or with intent to serve in any warlike or military operation whatever whether by land or by sea in the service of or for or under or in aid of any foreign prince, state or colony, either as an officer or a soldier,

or in any other military capacity, or as an officer or sailor or marine in any such ship or vessel as aforesaid, or

4th. "If *any person* whatever within the United Kingdom of Great Britain and Ireland, or in any part of his Majesty's dominions elsewhere, or *in any country, colony, settlement, island or place belonging to or subject to his Majesty*, shall hire, retain, engage or procure or shall attempt or endeavour to hire, retain, engage or procure any person or persons whatever to enlist or to engage to enlist, or to serve or to be employed in any such service or employment as aforesaid as an officer, soldier, sailor or marine, either in land or sea service, for or under or in aid of any foreign state, potentate, colony, province, part of any province or people, * * * or to go or to agree to go or embark from any part of his Majesty's dominions, for the purpose or with intent to be so enlisted, entered, engaged or employed as aforesaid, * * * in any or either of such cases, any person so offending shall be deemed guilty of a misdemeanor, and upon being convicted thereof upon any information or indictment, shall be punishable by fine and imprisonment or either of them, at the discretion of the court before which such offender shall be convicted."

Section 4 provided, that all such offences as should be committed within England should be tried in the Court of King's Bench at Westminster, or at the assizes or sessions of Oyer and Terminer, or any quarter sessions of the peace for the county or place where the offence was committed, and all the offences committed in Ireland might be tried in the Court of King's Bench in Dublin, or the assizes or quarter sessions in the county or place where the offence was committed, and all such offences committed in Scotland might be prosecuted in the Court of Justiciary in Scotland, or any other court competent to try criminal offences committed within the county, shire, &c., within which the offence was committed, and when any such offence was committed out of the United Kingdom, any justice of the peace residing near the place where the offence should be committed, on information on oath might issue his warrant to arrest the offender, and it should be lawful for the justice to commit such person to goal, to be delivered by due course of law or

otherwise, to hold such offender to bail to answer for such offence in the superior court competent to try and having jurisdiction to try criminal offences committed in such port or place, and "all such offences committed at any place out of the said United Kingdom, should and might be prosecuted and tried in any superior court of his Majesty's dominions competent to try and having jurisdiction to try criminal offences committed at the place where such offence should be committed."

Section 9 provided that any offences made punishable by the provisions of that act, committed out of the United Kingdom, might be prosecuted and tried in his Majesty's Court of King's Bench at Westminster, and the venue in such case laid at Westminster in the county of Middlesex.

The point raised on the argument was whether the statute, the principal passages from which applicable to this case I have abstracted, is in force in this country. The words of the statute seem broad enough to apply to this country. That part of the second section of the act which I have marked 4th, and have transcribed, not only enacted if any person should commit the offence charged in this indictment in Great Britain and Ireland, or in any part of his Majesty's dominions elsewhere (and as if to put the matter beyond all possible doubt, continues,) or in any country, *colony*, settlement, island or place belonging to or subject to his Majesty, he should be guilty of a misdemeanour. In 1819, when this act was passed, the province of Canada (then divided into Upper and Lower Canada, but now united,) was a colony belonging and subject to his Majesty George the Third.

This portion of the statute seems clearly to create an offence though the acts forbidden were committed in Canada. The words of the latter part of the fourth section of the statute quoted above, seem clearly to give jurisdiction to try the offence to the court before which the defendant was convicted.

The only ground on which we can hold that the statute of 59 Geo. III. is not in force in this country is because we have and then had a local parliament, and that enactments of this kind ought to be made by the authority of that parliament, and if not so made, they ought to be held not to be in force here.

By the Imperial Statute 31 Geo. III., cap. 31, a separate legislature was established in each section of the province to make laws "for the peace, welfare and good government thereof, such laws not being repugnant to that act." By the Union Act, Imp. Stat. 3 & 4 Vic., cap. 35, these provinces were again united and power given to the local legislature to pass laws for the peace, welfare, and good government of the province of Canada, such laws not being repugnant to that act or to such parts of 31 Geo. III., cap. 31, as were not repealed, or to any act of the Imperial Parliament made or to be made, and not thereby repealed, which did or should by express enactment, or by necessary intendment, extend to the provinces of Upper or Lower Canada, or either of them. The very words of the stat. 3 & 4 Vic., cap. 35, seem to imply that the power to legislate on some matters was and is reserved to the Imperial Parliament, though this province may be affected by such legislation.

As long as it is admitted that the home government, by whom the supreme power of the empire is exercised, is the proper channel through which all our relations and intercourse with foreign governments are to be carried on, the power to pass laws to bind the whole nation so far as regards those relations (and as necessarily arising out of them the peace of the empire) must rest with the Imperial Parliament.

Independently of the doctrine that our local legislature can only exercise such powers as are specially conferred upon it under the statutes passed by the Imperial Parliament, there are other points of view in which the question may be considered. Though possessing a domestic legislature we form part of a vast empire having other colonies exercising similar legislative powers to our own. If any one colony by passing laws or refusing to pass laws produced a state of things which created difficulty with a foreign state, the whole nation might be involved in a calamitous war from the imprudence or recklessness of a very unimportant colony. Considered in this light it appears to me that the statute which we are discussing relates to the conduct of citizens of the empire towards foreign states and people, and is on a subject which must be disposed of and legislated upon by the Imperial Parliament as representing the supreme legislative power of

the nation, and as to which it is necessary that all the subjects of the Crown should alike be bound. The very preamble of the act states that the proceedings which the statute prohibits may be prejudicial to and endanger the peace and welfare of the kingdom.

I cannot say that I have any doubt that the statute is in force in this country, and creates the offence of which the defendant was convicted before the proper tribunal. It is not contended that the evidence does not justify the conviction. The rule for a new trial will therefore be discharged.

Per cur.—Rule discharged.

IN RE S.—, AN ATTORNEY, IN THE SUIT OF McLEAN V. CAMPBELL.

Attorney—Costs—Misconduct.

An attorney having been retained to prosecute an action, (the plaintiff being unable to pay the witness fees,) requested the plaintiff's brother to do so; stating that he would see him paid when the money was recovered from the defendant. The suit was afterwards settled between the parties, and an order for taxation of the attorney's bill was taken out by the plaintiff. In the bill, as claimed by the attorney, he included the amount £12 7s. 9d. supposed to have been paid the witnesses; and on the taxation, made an affidavit in which he swore that £12 7s. 9d. was procured by him for the payment of the witnesses in the cause, and that the said amount was not, nor was any portion thereof, furnished by the plaintiff, or at any time refunded or paid by him; and that the said plaintiff knew that he was providing the means of paying the disbursements in the said cause, including the said witness fees. It subsequently appeared, but the attorney was not aware of it at the time, that only one small sum of the witness fees had been paid; and he, considering himself bound to repay the amount to the plaintiff's brother, included the total amount of the fees as disbursed in his bill of costs.

Upon a motion calling upon him to answer the affidavits filed as to the above facts,

Held—That inasmuch as it did not clearly appear that the attorney had no reason to suppose the money for which he was considered responsible to plaintiff's brother, had not been advanced, and as it would not be presumed he was about to act dishonourably with the money, if obtained from the plaintiff—the rule was discharged, the attorney being ordered to pay the plaintiff's costs of the application.

The attorney in the above cause in 1861, brought an action for John McLean, against Edward Campbell for the seduction of his sister. Neil McLean, the brother of John, was with him when the attorney Mr. Stanton was retained, and stated that his brother had not the means of paying the witnesses

who were required at the trial. The attorney requested Neil to pay them, and that he would see that he was reimbursed when the amount was recovered from the defendant. A verdict was rendered for the plaintiff for £100, and judgment was entered therefor, and for £40 9s. 3d. costs, including £12 7s. 9d. for disbursements to witnesses. The affidavit of disbursements was made by Neil McLean, and he swore as to the amounts mentioned in the schedule, as paid to the witnesses respectively, that they had been paid on behalf of the said plaintiff to the said witnesses severally, as in the said schedule set forth for loss of time and expense in coming to, remaining at, and returning from the said assizes, as witnesses as aforesaid."

That Neil McLean frequently came to the attorney's office, to see if the costs had been collected, and complained that it was hard for him to be so long out of his money paid to the witnesses. Proceedings were taken on the judgment to have the defendant in the cause orally examined, and an application having been made to commit him for non-attendance, the attorney was shewn by the clerk of defendant's attorney, an affidavit made by plaintiff, requiring him (the plaintiff's attorney) to stay all further proceedings. The attorney then had him served with his bill of costs, and included therein the amount which Neil McLean had sworn he had paid to the witnesses. The plaintiff's attorney stated, in an affidavit, filed when cause was shewn, that he then believed that Neil McLean had paid these disbursements, and he intended to collect them for Neil, as he had told him, if he would advance the witness fees, he would see him paid; and he thought it was perfectly right for him to do so, as he understood the plaintiff had settled the case with the defendant, and the amount coming to Neil could not be recovered by the judgment; he further swore he had no intention of recovering the witness' fees, except for the purpose of repaying to Neil the amount which he believed he had paid; he added, that he did not know until he was served on the 2nd February last, with copies of the affidavits made by the plaintiff and others, that Neil McLean had not paid the amount to the witnesses.

An order for taxing the bill having been made, he appeared before the Master on the 25th January, and filed

an affidavit made in this city on that day, in which he stated, amongst other things, "That the amount of twelve pounds seven shillings and nine-pence, disbursement to witnesses, *was procured by me*, for the payment of the witnesses in the said cause, and that *the said amount was not*, nor was any portion thereof, *furnished by the plaintiff*, or at any time refunded or paid by him, and that the said plaintiff knew that I was providing the means of paying the disbursements in the said cause, including the said witness' fees."

In answer to this affidavit, there were affidavits filed by the plaintiff, one made by himself, and two by witnesses examined on the trial, one of whom stated that he had not been paid his fees, another stated he had only received a small sum, and plaintiff denied any knowledge of the attorneys having procured the money to pay the witnesses, and stated his belief the witnesses had not been paid. He also stated that one of the witnesses had told him that he had received Neil McLean's note for the amount of his witness fees. An affidavit of Neil McLean was filed before the final taxation of costs, in which he stated, that in order to assist in the prosecution of the action, he served the subpoenas in the cause, and at the time of the service, became personally responsible to all of the witnesses for their fees, that he told the plaintiffs after the trial that he had satisfied the witnesses for their fees, and he would wait for the money until it would be recovered from Campbell. That he did become personally responsible to the witnesses for their fees, and they held him, and he was liable to pay them, except Dr. Hamilton, whose fees, amounting to eight dollars, he had paid, and half a dollar to John Rain, on account of his fees; that he gave his note to Dr. Stewart, for his fees, amounting as he thought, to \$8 50, which was then over due; that none of the witnesses had any claim against the plaintiff for their fees, but they held him, Neil McLean, alone liable, as they attended on his promises to pay them.

Neil concludes his affidavit by stating that the plaintiff's attorney requested him to see to the payment of the witnesses, as the plaintiff was short of money.

On the taxation, the Master refused to allow the fees to the witnesses to the plaintiff's attorney, and the attorney

was compelled to pay the costs of taxation of his bill which amounted to £6 14s.

In Hilary Term, *Foster*, as counsel for John McLean, obtained a rule calling on the attorney to shew cause why, on the first day of Easter Term, he should not answer the matters contained in the affidavit of disbursements made by Neil McLean, and in the affidavit made by him, from which the extract is above quoted, and on the grounds that the statements of payments to and procuring money for witnesses contained in the said affidavits, appear to be untrue, and the said affidavits appeared to be filed by him for the purpose of obtaining the sum of £12 7s. 9d., or some other sum of money, on the pretext of having been paid by him to witnesses in the said cause, when in fact such money was never so paid by him.

The facts stated by the attorney in answer, have already been embodied in the former part of this statement, and the principal fact is that he requested Neil McLean to pay the witnesses, and he would see him repaid when the amount was recovered from the defendant in the action; that he believed Neil had paid the witnesses, because he had made the affidavit of disbursements, and because he had from time to time applied to him to know if the amount had been recovered from the defendant, and complained it was hard for him to lay out of his money. He also stated that he thought it was right to obtain the money from plaintiff to repay Neil, and that up to the 2nd February, and after he had made the affidavit complained of, he verily believed Neil had paid the witnesses in full.

The fact of Neil repeatedly applying to know if the amount of the judgment in the suit had been collected, and complaining of being kept out of his money, was also corroborated by the affidavits of two gentlemen who were in the attorneys office at the time, one his partner, and the other a student-at-law there.

During the term, *Becher*, Q. C., shewed cause; and *English* supported the rule.

RICHARDS, C. J.—The statements contained in S———'s affidavit, that the amount of £12 7s. 9d. disbursements

to witnesses was procured by him for the payment of the witnesses; that no portion of it was refunded or paid by plaintiff, and that plaintiff knew that he was providing the means of paying the disbursements in the cause, including the witness fees; taken as they stood when made, and in the absence of any explanation, would lead any person who read them and the papers then filed in the cause, to the conclusion that this amount taxed in the cause as disbursed to the witnesses, and paid to them as sworn by Neil McLean, had been raised by S——, and handed over to Neil to be paid to the witnesses.

The object in making the affidavit, was to use it before the Master, to have the £12 7s. 9d. taxed against his client as a disbursement made in the cause, and was well calculated to induce the Master to tax it as he desired. Taken with the subsequent explanations, that what he meant was that he had induced another person (on his promise to see him repaid) to agree to advance the money and pay the witnesses, and that the plaintiff knew he was thus providing for the payment of the witness fees, and that he believed the witnesses were paid; taken with these explanations, the language used by Mr. S—— in his affidavit would not be quite reconcilable with what is now urged on his behalf he meant. He speaks of the *amount* being procured by him for the payment of the witnesses, and that the *said amount* was not, nor was any portion of it *furnished* by the plaintiff or at any time *refunded* or *paid by* him; and that the plaintiff knew he was providing the *means of paying* the disbursements, including witness fees. This language applies to the raising of *money* by himself, rather than to an agreement on his part to indemnify a third party for paying such money; and when it became manifest that he in fact had paid no money for witness fees, and had procured none for that purpose, the person applying for the rule might well assume that the facts so stated appeared to be untrue, and call upon him to answer them.

As this application is one which affects the character and professional standing of the attorney, it is but just to take the most favourable view we can of it for him.

From anything that appears on the papers before us, there is no reason to suppose he knew that Neil McLean had not actually paid the witnesses the amount he swore he had paid to them in the affidavit of disbursements. He states in his affidavit, and it is not contradicted, that he had agreed to repay this amount to Neil McLean, and it was to obtain the money for that purpose he included the amount in his bill of costs, and in the affidavit filed by him. It is true that if he had received these disbursements, he might not, if inclined to act dishonestly, have paid them over to Neil McLean, but it is not probable that any such result would have followed, for Neil McLean appears from time to time to have made enquiry if the money had been received by Mr. S——— for these disbursements, and to have complained of delay. It is not likely that Mr. S——— would have taken the course suggested, or that he made the affidavit in that view, for it would doubtless have led him into great difficulty. If he had compelled John McLean to pay him these disbursements, then it was a matter which would have come to the knowledge of Neil, and Neil would have compelled him to pay the amount over to him ; if he had refused to do this, Neil, or John, or both, could have applied to the court against him. Besides, the affidavit complained of was made after a difficulty had arisen between John and himself, when John was taking steps to have his bill of costs taxed, and after the matter had in this way got into the hands of another professional gentleman, who would not be likely to suffer so patent an absurdity as the taxation of these costs against his client, when the amounts had not in fact been paid to the witnesses.

On the whole, though the language of the affidavit of the 25th of January, even with the explanation offered, can scarcely be reconciled with the admitted facts, yet I cannot say that I feel clear that it was made for any corrupt purpose. The facts, as they are presented, are not sufficiently clear, in my judgment, to warrant me in assuming that the attorney, in what he did, was actually intending to defraud any person, and coming short of this, I do not think we would be justified in dealing with him so severely

as we otherwise would, if we were satisfied he desired to obtain these moneys from his client for his own private advantage, or to the detriment of his client.

I must express my astonishment at the affidavits made by Neil McLean. By the affidavit of disbursements, he swears that certain sums of money have been *paid* to the witnesses. By the subsequent affidavit, made in February last, he expressly states that only one of these very witnesses had been paid the full amount, and that one had received his note of hand for his fees; but the others had not been paid, except one who had received a small sum. The affidavit of disbursements contains a certificate, signed by the commissioner, that it had been read over and explained to McLean, who appeared to understand the same. If he did understand it, I fail to see upon what principle he can justify himself on the facts stated in making such an affidavit.

Looking at all the facts of the case, and viewing them in the most favourable light for Mr. S——, it appears to me that he was guilty of great carelessness, to use the mildest language, in preparing the affidavit complained of. In framing an affidavit made under such circumstances, due regard to his own reputation should have induced him to consider the effect of the words he was using, so as not to expose himself to the imputation of making statements that were not true in fact. The inconvenience which has resulted to him from this application, he has brought upon himself, by using language in an affidavit which does not convey to the reader of it the truth in relation to the matters deposed to by him, but which, without explanation, leads to a contrary conclusion. It is to be hoped that cases like this, where the conduct of a professional gentleman is brought before us in a way to create doubts as to what his intentions were, and when his veracity is called in question, will not be frequent.

If a clear case of fraud or fraudulent practice is made out against an attorney, this court will feel it their duty to make an example of him. It is of the utmost consequence to the profession, that a high tone for integrity and honourable dealing should be preserved amongst them, and as far as they can contribute to the maintenance of that position to

the profession which they ought to occupy, the court will be prompt to lend its aid.

The recent cases in England, shew that the courts there do not hesitate to deal summarily with officers of the court who are guilty of improper conduct, and the courts in this country, I doubt not will be equally alive to their duty in that respect.

Under the circumstances, the party making the application was well warranted in bringing the facts before the court; and we think the ends of justice will be best attained in directing that the rule be discharged, but that Mr. S—— do pay to John McLean the costs of this application.

Per cur.—Rule accordingly.

SANDERSON V. GAIRDNER.

Money paid under protest—By whom it may be recovered back.

Plaintiff conveyed his land to Gooding to raise money by mortgage upon it for the plaintiff's use. Gooding did so, and for the plaintiff, paid the defendant's attorney about \$160 under pressure, but under protest. The plaintiff now sues to recover this money back.

Held, that as the money paid by Gooding was the plaintiff's money in fact, and as no complaint was made that it had not been left expressly to the jury to say whether it was actually the money of Gooding or of the plaintiff, that it might be presumed Gooding had paid it to the plaintiff, or had accounted for it to the plaintiff as he had raised the money for the plaintiff.

The declaration was for money payable to plaintiff, and for money had and received for plaintiff, by defendant.

The pleas were, never indebted, payment, and set off.

The cause was tried before *Morrison, J.*, at the last assizes for Huron and Bruce, when a verdict was found for the plaintiff, and \$163 damages.

The facts appear to be, from the documents and evidence, as follows, and as they were stated during the argument:

The plaintiff, in 1859, mortgaged his land to Thomas Gairdner, for \$780, which was due in 1860.

The plaintiff and his brother Thomas Sanderson, had also a judgment recovered against them by the defendant in 1860, for \$332.

Thomas Gairdner, the mortgagee, died before 1862, and Robert Gairdner was appointed executor.

Robert Gairdner, the executor, sued the plaintiff on this mortgage.

This defendant had an execution against the lands of this plaintiff, and his brother, on the above judgment in the sheriff's hands.

Both the mortgage and the judgment being outstanding, the plaintiff, in January or February, 1862, applied to Mr. Gooding, as his attorney, to raise money on the security of his mortgaged land, for the purpose of paying off both the mortgage and execution.

Gooding did raise \$1000 upon this land, and the plaintiff gave a mortgage for it to Dr. Seagram.

This \$1000 was paid to Mr. Cameron of Goderich, the attorney both for the mortgage and execution creditors above spoken of.

Mr. Cameron, for his clients, agreed to discharge the first mortgage for the \$780, and to withdraw the execution against the lands of the plaintiff and his brother upon the judgment.

The payment of the \$1000 still left \$365 due by the plaintiff on the first mortgage, and on the judgment, and Cameron agreed to take from the plaintiff a second mortgage upon his land, after, Dr. Seagram's, as security for it.

The first mortgage for the \$780 was discharged.

The plaintiff then gave a new second mortgage, to rank after Dr. Seagram's, to this defendant, for \$365, on the 12th of February, 1862.

At this time Thomas Sanderson owed the plaintiff about \$150, and it was arranged with Cameron, when the second mortgage for \$365 was given, that so soon as Thos. Sanderson paid the \$150, it should be applied upon this mortgage.

Cameron afterwards put the execution against the lands of the plaintiff and Thomas Sanderson, into the sheriff's hands, to levy \$161, being 9 per cent. which it is said he omitted on the settlement to charge to the plaintiff on the mortgage for \$780 from the time it fell due until this settlement was made, and which he said the plaintiff had agreed to pay to Robert Gairdner, the executor of the mortgagee, for forbearance, over and above the six per cent. which only was charged in the settlement.

In August, 1862, Thomas Sanderson paid to Cameron \$161 on the second mortgage, as the plaintiff contends, but as the defendant says, to discharge Thomas Sanderson's own lands from the execution which had been so put back into the sheriff's hands to enforce payment of the \$161.

In February or March, 1864, Cameron, as attorney for the defendant, gave notice that he would sell, under the power in the second mortgage, unless he were paid the whole \$365. It was arranged, then, between the plaintiff and Gooding, that the plaintiff should convey the land to Gooding in fee, and that Gooding should, in his name, but for the plaintiff's benefit, negotiate for a loan of money sufficient to pay off the encumbrance upon it.

The plaintiff did so convey to Gooding, and Gooding did effect a loan upon the land sufficient to pay off the claims upon it.

Cameron was offered the \$365, the amount of the second mortgage—less the \$161 before paid to him; but he refused to allow of this deduction, and he threatened to proceed with the sale of the land, which had been advertised, unless the whole amount of the mortgage money without any deduction was at once paid to him.

Gooding then paid the whole of the money claimed by Cameron, but under protest as to the \$161.

The original mortgage for £195, was for the loan of £150 for one year, at 30 per cent., making up the £195, no interest being reserved in the mortgage itself.

S. Richards, Q. C., for the defendant, obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside on the ground that it was against law and evidence in this: That the plaintiff's right to maintain the action was not made out; that the payment of \$160 made by Thomas Sanderson, was made on the judgment, and not on the second mortgage; and that the payment was not a payment by the plaintiff, and was made long before the mortgage became due; that such payment was made on account of the claim for interest previously due; that the whole amount of the second mortgage, and interest thereon, was due at the time the same was paid; that the amount paid under the last mentioned mortgage was paid by Mr. Good-

ing, and by the proceeds of a mortgage of his lands, and not by the plaintiff, and Gooding, if any one, was the person who should have sued in this action; that the payment made by Thomas Sanderson was made voluntarily, and with full knowledge of the facts, and that the payment made by Gooding was made with full knowledge of the facts, and said moneys cannot be recovered back; and also in this, that the defendants were entitled to succeed on the plea of set off on the claim for interest—or why the verdict should not be set aside for misdirection of the learned judge, in ruling that the agreement to pay more than six per cent. interest was void because not in writing; and that the defendant could not claim more than six per cent. interest, notwithstanding a forbearance to enforce the first mortgage and judgment, on an agreement to pay more than six per cent interest.

Robinson, Q. C., shewed cause. The second mortgage for the \$365, included the amount due on the execution, and it is therefore immaterial whether Thomas Sanderson paid the \$161 to Cameron on the execution or on this mortgage, for it was then all the same money and the one debt. The payment under protest made through Gooding, was really the plaintiff's money, and he is entitled to recover it back. *Close v. Phipps*, 7 M. & G. 586, and *Roscoe's N. P.* 10 Ed. 410.

S. Richards Q. C., contra. The payment under protest by Gooding was of *his* money; he had borrowed it; he had mortgaged *his* land for it, and given *his* covenant to repay it; and although all this may have been for the plaintiff's benefit, still he cannot sue at law for it; the action should have been brought by and in the name of Gooding as plaintiff. *Kaines v. Stacey*, 9 C. P. U. C. 355; *Quintan v. Gordon*, 7 L. J. U. C. 232; *Perry v. Newcastle District Mutual Fire Insurance Co.* 8 Q. B. U. C. 363; *Snarr v. Small*, 13 Q. B. U. C. 125.

ADAM WILSON.—It appears to be quite clear that all this difficulty has occurred from Mr. Cameron's excessive demand against the plaintiff; or according to his own

account, from his own oversight or neglect, in charging only six per cent. interest, instead of 15 per cent. on the mortgage, of \$780 from the time it fell due until it was paid.

Whichever way it may be, it seems strange that he should have thought himself justified in enforcing the payment of this sum, as a deficiency on the mortgage, through the intervention of an execution due to a different creditor altogether. What possible right could Robert Gairdner, the executor of Thomas Gairdner, the mortgagee, have had for any deficiency claimed by the plaintiff, to make up this deficiency by the summary process of an execution issued by the defendant for a totally different debt against the lands of this plaintiff, and of Thomas Sanderson, who never owed one farthing of the mortgage debt.

This was a very wanton abuse of the process of the court, to enforce a not very righteous demand.

It is not improbable that some such bargain may have been made by the plaintiff to preserve his property at the extortionate rate of 15 per cent., when he had already paid just double the same rate for a previous period; but if a party make such a claim, he must first of all establish it very clearly, and secondly, he must enforce the payment of it by the process of the law justly and fairly executed.

There can be no doubt that this money is recoverable back from the defendant either by the plaintiff or, by his trustee, Mr. Gooding (*Fraser v. Pendlebury*, 10 W. R. 104); and the question is, by which of these parties this suit should have been brought?

The \$161 which was paid by Thos. Sanderson in August, 1862, was the money of the plaintiff, and was paid by Thos. Sanderson for the plaintiff. If this is a sum of money which can be sued for, the plaintiff is clearly entitled to maintain the action for it.

The money which was paid by Gooding in February or March of this year, under protest, would *prima facie* be his money, and be recoverable by him; but we do not see why, after he had raised the money, he might not have paid it over, or be presumed to have paid it over to, or to have accounted with the plaintiff for it, as he had raised the

money for the plaintiff as trustee for him, in which case, the money as between the plaintiff and the defendant would have been the plaintiff's money.

In many cases, such presumptions are frequently made. In *Doe d. Hammond v. Cooke*, 6 Bing. 174, it is said that such a presumption may be made "where the title of the party who calls for the presumption is good in substance, but wanting in some collateral matter necessary to make it complete in point of form." If the plaintiff had personally paid the money to the defendant, there would be evidence sufficient that it was his money which he was paying in discharging his own debt; but because he did not pay it with his own hand, but through or by Mr. Gooding, will not nevertheless prevent the money being the plaintiff's money, if after Gooding had raised it, he had paid it to or accounted for it with the plaintiff (*Edwards v. Lowndes*, 1 El. & Bl. 89); or if the jury could, and properly might have presumed such a fact, and we think we should not too closely scrutinise the plaintiff's title against the substance of it, in favour of the defendant, who is so little entitled to the consideration of either the court or the jury, from the manner in which he and his attorney have dealt with the plaintiff, by means of the process of the court.

In *Scarfe v. Halifax*, 7 M. & W. 288, it was held that the Judge should have left it to the jury to say whether the money there sued for was the money of the plaintiff or not. Here no complaint has been made that this was not left to the jury, nor does it appear to have been suggested at the trial that such a question should have been left to the jury, although in the charge of the learned judge, this very point is embraced though not perhaps very specifically expressed. If, on the other hand, the defendant's view be adopted, that the action is brought to recover the payment of the \$161 which was made by the plaintiff's brother, the plaintiff is still entitled to succeed because the jury have found that the payment was made on account of the plaintiff, and that it was the plaintiff's money.

We think the rule should be discharged.

Per cur.—Rule discharged.

LAVIS V. BAKER.

New trial—Motion for by attaching creditor—Rule for payment of costs—Abandonment of—Costs of in such case.

One M., an attaching creditor of defendant, applied to this court for a new trial of this cause and the rule was made absolute granting same on payment of costs. The rule was taken out but never served, and subsequently M. gave plaintiff notice that he abandoned same. On application by plaintiff on notice to M. to shew cause why said rule should not be discharged with costs to be paid by M.

Held, that the application by M. was in the nature of a collateral proceeding, and though he might, when voluntarily seeking the aid of the court, have been ordered to pay the costs of opposing the rule which he had obtained, he could not now be ordered to pay the same when brought before the court by compulsion, and not being a party to the record.

In this case in Easter Term, 26 Vic., *Diamond* obtained on behalf of one Thomas McIntosh, an attaching creditor of defendant, a rule *nisi* to set aside the verdict obtained for the plaintiff in the spring assizes of 1863. In Trinity Term last *Harrison* shewed cause, and at the sittings of the court for judgments after Michaelmas Term following, the rule to set aside the verdict and grant a new assessment of damages was made absolute on payment of costs by McIntosh to the plaintiff. The rule absolute appears to have been taken out, but was never served on the plaintiff or his attorney. On the 8th of February last the attorney of McIntosh gave the plaintiff's attorney notice that he abandoned his rule. It appeared the rule had been taken out without the express authority of McIntosh's attorney, and he refused to act upon it, and afterwards, on the 8th of February, gave the notice mentioned.

In Hilary Term last, on the 10th of February, *Harrison* for the plaintiff moved for and obtained a rule calling on Thomas McIntosh, on notice of the rule to be given to him or his attorney, to shew cause.

1st. Why the rule *nisi* for a new trial in this cause, obtained on the part and behalf of the said Thomas McIntosh, should not be discharged with costs.

2nd. Or why the rule absolute for a new trial in this cause, issued for and on behalf of the said Thomas McIntosh, should not be discharged with costs.

3rd. And why the said Thomas McIntosh should not pay the costs of this application.

The rule was enlarged to Easter Term, when *Boyd* shewed

cause and contended plaintiff's proper motion would have been to set aside the rule granting the new trial, and to tax his costs. He urged that as the rule was abandoned before the motion was made, plaintiff had no reason to make the present application. That in addition to the abandonment of the rule by express notice, it had never been served, and therefore plaintiff could have entered his judgment if he had thought proper. He referred to *Farrer v. De Flinn*, 8 Jurist, 779; *In re. Wilson and Hector*, 9 U. C. L. J. 132; *Reynolds v. Kelly*, 3 Irish Law Reports, 186. He contended that plaintiff was not in a position to ask that McIntosh should pay the costs of opposing the rule granting the new trial. The effect of that rule was merely to impose those terms if the new trial had been taken, and if not taken then the costs could not be allowed against McIntosh. He referred to *Eccles v. Harper*, 14 M. & W. 248. That as far as McIntosh was concerned the application was a mere collateral proceeding, he was a stranger to the record who applied to the court to have a new trial; and it was granted to him on payment of costs. If he did not pay the costs he was not in a position to get the new trial, and so far as he was concerned that proceeding was at an end. That if the order had been that the costs of the new trial should be paid within a certain time, and if not paid by that time, that the rule *nisi* should be discharged with costs to be paid by McIntosh, then the plaintiff might have recovered his costs; but no proceedings can now be taken to bring about the same result, for the option was one plainly open to McIntosh either to take the new trial on payment of costs or not to take it at all. But no such option is now open to him for he has given formal notice of the abandonment of the rule, and has omitted to serve it. He contended that the decisions on proceedings in collateral matters are those that should govern this case and if so plaintiff is not entitled to the costs of opposing the rule *nisi* for the new trial. He referred to *Horton v. Westminster Improvement Commissioners*, 21 L. J. Ex. 326; *Field v. Sawyer*, 6 C. B. 71; *Brown v. Millington*, 22 L. J. Ex. 138; *Pugh v. Kerr*, 5 M. & W. 164; *S. C. 6 M. & W. 17*; *The Gore Bank v. Webster*, before Chief Justice *Draper* in Chambers when there was a substantive order to pay costs; *Morley v.*

The Bank of British North America, 10 L. J. U. C. 128 ; Chitty's Archibald, 11 edn. 510, 1548, 1578, 1703-4 ; Black v. Langster, 3 Dowl. 206 ; DeRutzen v. Lloyd, 5 A. & E. 456 ; Rabidon v. Harkin, 2 U. C. P. R. 129 ; Vanevery v. Drake, 3 U. C. P. R. 84, 86.

Harrison, contra, contended the court would do now what it ought to have done when the rule was granted, viz., amend it so that it would provide that in the event of the applicant not taking the new trial he should pay the costs of opposing his rule. He stated that he desired the court, at the time of giving the judgment, to frame the rule in this way, but it was not thought necessary. He urged that it was gross injustice to the plaintiff to stay his proceedings, delay him in recovering his debt, and put him to the expense of opposing the rule and embarrass him in going on with his cause, and yet McIntosh was not to be compelled to pay anything for all the trouble and inconvenience he had imposed upon the court and the plaintiff. He referred to *Regina v. Greene*, 2 G. & D. 789 ; *Edward v. Rogers*, 14 Jurist, 91 ; *Hutchinson v. Gillespie*, 11 Ex. 798 ; *Hutchinson v. Greenwood*, 4 E. & B. 324.

RICHARDS, C. J.—If this application had been made in a case where the defendant in the action had obtained a rule for a new trial, on payment of costs, and had failed to pay the costs, I have no doubt the proper course would have been to discharge the rule for the new trial ; and I apprehend that in effect that would have been to discharge the rule *nisi* as well. When the rule *nisi* is discharged, the costs of opposing it are taxed to the successful party, as costs of the cause, and such would be the effect in this case, if we simply discharged the rule for a new trial, if it had been obtained by the defendant in the suit.

I feel bound to decide, however, after giving this case the best consideration in my power, that the obtaining of this rule by McIntosh was more in the nature of a collateral proceeding, and though we might, perhaps, have ordered him to pay the costs of opposing the rule which he obtained, yet, not having done so when he came before the court as a voluntary act of his own, asking the court to do something for his benefit,

I cannot see my way clear in compelling him to do so now, when he is brought before us by compulsion. Besides, making him pay those costs now is not even asked for in this rule, and if it had been, as already intimated, there seems to be serious obstacles in the way of doing so. If the rule granting the new trial had been drawn up in the form proper to have justified us in calling on him to pay the costs, he would have been in a position to make a choice as to what course he would have taken; the option is not now left him, if that would make any difference. He came into court to ask that something should be done; the court stated the terms on which they would grant what he sought; he declined taking it on those terms, and withdrew from the court. I do not think we can properly bring him back before us to impose further terms on him. The observations of Lord *Abinger*, in *Hayward v. Giffard*, 4 M. & W. 196, are pertinent on this point. He said: "The authority of the courts at Westminster is derived from the Queen's writ, directing them to take cognizance of the suits mentioned in the writs respectively, and thus bringing the parties before them. This being so, they have no power to order any particular individual to come before them at their pleasure. * * * We cannot make any order against an individual who is not a party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit."

The general doctrine as to rules on collateral proceedings is thus laid down in *Patterson's Practice*, 1101: "If a rule is made absolute on payment of costs, the court will not limit a time for the payment of such costs; and if the rule is abandoned, there is no mode of compelling payment of costs to the opposite party. The only mode of avoiding this is to have the rule made so that the costs shall be paid at all events."

The case of *Pugh v. Kerr*, 5 M. & W. 164; and same case in 6 M. & W. 17; was one of peculiar hardship to the plaintiff, and the *Chief Baron*, in the case, as reported, had intimated that certain costs would be taxed as costs in the cause, but in the case as finally decided, the court disallowed these costs, amounting to some £200, when taxed as costs in the cause.

We cannot make the rule absolute on the first ground, so far as to allow the costs, because the costs would be costs in the cause, and there is no pretence for taxing them against the defendant in the original action. The same reasoning will apply to the second ground. And, as to what is thirdly desired by the rule, it is doubtful if it was at all necessary, after McIntosh had given notice of the abandonment of the rule, that this application should have been made; and even if it was necessary, I do not think we have power to call McIntosh before us to make him pay such costs.

Though not feeling warranted in making McIntosh pay costs, I am little inclined to give him any.

I think the rule as to discharging the rule for a new trial, should be made absolute, without costs on either rule to either party.

Per cur.—Rule absolute.

CAMERON V. MILLOY.

*Steamboat—Accident to passenger by—Negligence of owner in landing passengers
—Verdict against weight of evidence—Form of rule.*

Plaintiff was passenger by defendant's steamboat from T. to N. Persons in charge of boat refused to stop at the wharf at N. in the ordinary manner to land passengers, but ran the boat along close to the wharf, when plaintiff jumped on shore while the boat was in motion and received serious injury by falling when doing so. The judge directed the jury that the defendant was responsible if he did not land the passengers in the ordinary and careful manner, but that the plaintiff could not recover if the injury to him arose from his own want of care in jumping or hurry in landing. The jury having found a verdict for defendant, a new trial was ordered on payment of costs as the verdict was against the weight of evidence.

Held, 1st. That a steamboat owner who departs from the ordinary and proper method of landing passengers is responsible for the increased danger of the method he adopts.

2nd. It is a sufficient statement of the grounds on which a rule *nisi* is moved to say that the verdict is against law and evidence, without stating in what manner it is contrary to the evidence.

The declaration stated that the defendant was the owner of the steamer Zimmerman, carrying passengers from Toronto to the town of Niagara for reward; that the plaintiff was received as a passenger to be safely carried on the steamer from Toronto to Niagara for reward to the defendant, yet the defendant did not safely carry the plaintiff on the steamer

from Toronto to Niagara, but so negligently and unskilfully conducted himself that the plaintiff was thereby severely injured and was thereby prevented from attending to his business as a barrister and attorney for a long time, and incurred great expense in and about his cure.

The second count was substantially the same, but alleges that it was the defendant's duty "to stop the steamer at the wharf at Niagara, to enable passengers to land in safety at the wharf, and to provide safe and proper gangways or other means and reasonable opportunities for passengers to land at the wharf." Yet the defendant neglected and refused to stop the vessel at the wharf at Niagara to enable the plaintiff to land in safety on the wharf, and to provide safe and proper gangways or other means and a reasonable opportunity for the plaintiff to land at the wharf, in consequence whereof the plaintiff in landing at the wharf from the vessel was thrown down and fell and was greatly injured, &c.

The defendant pleaded not guilty.

The cause was tried at the last winter assizes for York and Peel before Mr. Justice Hagarty, when a verdict was found for the defendant.

In last Hilary Term *M. C. Cameron*, Q. C., obtained a rule on the defendant to shew cause why a new trial should not be granted, the verdict being contrary to law and evidence and the judges charge.

The evidence was to the effect that the steamer was advertised to call at Niagara; that it was reported on board she would not stop there, as she was behind time; that the plaintiff and the witness Burn went to the mate, as the defendant was not on board, and he referred them to the purser, the purser said he could not put them ashore at Niagara as he would be late for the train at Lewiston, the plaintiff said to the purser he and the witness had bought tickets for Niagara, and had important business there and wanted to be landed; he said he could not stop, then he said he would ease off the steam, shove a gangway out, and they could jump out as the boat passed the dock. The plaintiff said he insisted on the boat stopping, he did not like to jump and was not used to it, if he was injured he would make them pay for it. The purser

directed the three of us (as the witness says, the plaintiff, the witness, and one Davis,) to come to the after gangway to be ready; the gangway was run out three or four feet; several men stood by it; the boat was run within a few feet of the pier; the gangway was over the wharf, but was much higher than the wharf. The witness says, "I jumped before the plaintiff, and as I struck the dock I turned and saw the plaintiff down on the dock; he said he was hurt; I helped him up into a carriage; he said he was faint; we went to St. Catharines; he suffered considerably; he was laid up for five or six months after. The boat, after going twice her own length, stopped and came to the wharf. We were given to understand the boat would not stop; we were told to jump by some one seeming to have charge; I think it was the purser; some one told the plaintiff to jump; I did not understand any one telling him not to jump; the gangway was two feet or more higher than the wharf; the boat was in motion when we jumped."

Davis said he heard the conversation referred to between the plaintiff and the purser; that when the plaintiff said he wanted to be put ashore at Niagara, as he had important legal business to attend to, the purser answered he could not help it, that the boat was behind time, and that if he put in at Niagara he would not reach Lewiston in time; that some of the passengers must be inconvenienced, and he thought those for Niagara might as well be inconvenienced as those for the east; at all events he should give those for the east the preference. The plaintiff insisted on the boat putting in at Niagara, but the purser said it was of no use saying anything more on the subject, that he should not put in there; the plaintiff said he would bring an action for damages if he were not put off at Niagara, the purser said he would run the risk of an action; the purser ultimately said he would take the steamer as near to the wharf as possible, but he would not stop the boat, and that the plaintiff and any others insisting to go on shore must jump it; the plaintiff said that some accident might happen, but if that was all the purser would do he must jump as the purser suggested; the purser said that was all he would do; the plaintiff told him if any accident hap-

pened he would bring an action for not stopping the boat, the purser said he would run the risk of an action. The witness says that he told the purser that a lady who was anxious to be landed at Niagara would also bring an action if he did not stop the boat at Niagara, to which he said he would risk all actions. The witness further says the boat slackened her speed as she passed the wharf, she was going slow; she was in motion when the plaintiff jumped, and he heard some one call to the plaintiff to jump, which he did, and shortly afterwards fell as if he were hurt. Medical evidence was given to shew the serious nature of the injury received, the time the plaintiff was confined to his house away from his business, and the expense he was at for such medical attendance, the knee joint was the seat of injury, it is stiff now, and will probably always be so; the surgeon's bill was £20, the attendance upon him continued for about six months.

A nonsuit was moved for on this evidence because the contract as laid was not proved. The contract proved was that the plaintiff should jump ashore at Niagara, as the mate had proposed, and the plaintiff knowing the risk of it had elected to make such a bargain, and cannot now complain of the injury arising from it.

The case however proceeded, the defendant called several witnesses.

The Purser said—we had no particular connexion at Niagara, have frequently passed Niagara and left our passengers there on our return from Lewiston; he did not tell plaintiff to jump nor did he hear any one tell him, nor did he see any one jump.

The Mate said that Corneen, marine inspector, and also a passenger said to him, we have made up our minds to jump out if you will go slow and shave the dock, and put out a gangway and have a couple of men at the end, and that the plaintiff said “we agree to that and I'll risk to jump out if you will come close to the wharf.” He says he backed the boat and she stopped, the gangway was put out, and all the passengers and baggage put out; the plaintiff jumped before the boat stopped backing; never told any one to jump; the first understanding of the passengers was to jump, but the

last direction was to stop, which was given in consequence of the wind, and which the purser said he told to the plaintiff.

Corneen, said, he called out to those who were getting ready to jump, "don't jump," several times; he heard no one say "jump;" did not tell the plaintiff the boat would stop, nor did the mate tell him (the witness). He assisted a lady to land off the gangway.

Harney, one of the hands, said he was at the gangway, "it was a dangerous thing to jump then;" that as a gentleman came running along with his bag he saw two jump; thought it was most dangerous; heard nothing said about jumping or not jumping.

The learned judge told the jury to the effect laid down in *Tuff v. Warman*, 5 C. B. N. S. 585, as being the correct manner of charging juries in such cases, and further that if the steamboat proprietor told the passengers that he could not stop or could only stop an instant, and hurried them off by a gangway while the vessel was in motion, and any of the passengers were injured in getting out, he would in general be responsible; but if the injury arose from the plaintiff's own hurry or want of care in jumping, or waiting till the boat stopped or the gangway was secured it would be otherwise. He declined to tell the jury, as the defendant's counsel requested, that the plaintiff having elected to jump from the gangway, placed as it had been promised it would be placed by the defendant, could not recover at all. The verdict was for the defendant as before stated.

In the last term *Anderson* shewed cause. He objected to the rule as not complying with the Common Law Procedure Act, sec. 23, which enacts that "the grounds upon which such rule has been granted shall be shortly stated therein," and it also enacts that in case of any omission the court may permit the rule to be amended and served again on such terms as are deemed reasonable. He referred to *Strange v. Dillon*, 22 Q. B. U. C. 223, and *Montgomery v. Dean*, 7 C. P. U. C. 513.

The court proposed to the plaintiff's counsel to amend his rule if he desired it. He declined the amendment, contending that the rule was sufficient when it complained of the verdict

being contrary to *law and evidence* without stating in what manner it was contrary to law and to the evidence.

Anderson then, on the merits, argued that there was no proof of the boat having been advertised to stop at Niagara; that in consequence of the discussion which took place on board the boat about stopping or not stopping at Niagara, a special arrangement was made between the plaintiff and the defendant, as to the means by which the plaintiff was to be landed, and as the defendant did all he had agreed to do in giving effect to this arrangement, he was not liable, and the plaintiff cannot hold the defendant responsible for the injury he sustained; that under any circumstances the plaintiff was not obliged to jump at all; but in addition to this there was evidence of positive negligence against the plaintiff in jumping when he was cautioned not to jump. He referred to *Faulkner v. Brine*, 1 F. & F. 254; *Stockdale v. The Lancashire and Yorkshire Road Company*, 8 L. T. N. S. 289.

M. C. Cameron, Q. C., contra. There was evidence that the vessel was to stop at Niagara, for passengers' tickets were sold for that place, and the plaintiff was the purchaser of one of them. The necessity of landing from the gangway arose from the defendant's negligence in starting too late from Toronto, and the defendant must be answerable for landing his passengers in this dangerous manner. He commented upon the cases above mentioned, and cited also *Thompson v. Macklem*, 2 Q. B. U. C. 300.

ADAM WILSON, J.—As to the point of practice which was raised as to the sufficiency of the rule, we find on referring to *Chitty's Forms*, 9 edn. 842, some of the form of rules in the different cases stated as follows:

“For the erroneous rejection (*or admission*) of (*describe the document shortly as evidence for the*). For misdirection, the judge having (*here state concisely the nature of the alleged misdirection*) that the verdict was against the weight of evidence. That the verdict was contrary to the evidence and to the direction of the judge and perverse.” We must hold then the rule to be sufficient in form although it must be admitted that the statute is rendered of very little practical

use, for the grounds on which a verdict is contrary to law and to the evidence could be succinctly stated in a rule; but the preliminary objections must be overruled. As to the general question the case is of much general importance, where there is so large a travelling community. The plaintiff has, no doubt, sustained a serious injury, for which he should be recompensed, if the cause of that injury can be attributed to the defendant. The evidence shews that the defendant did engage to carry the plaintiff as a passenger in the defendant's vessel, from Toronto to Niagara; the obligation upon the defendant, therefore, was to carry the plaintiff safely and securely, and to land him safely and securely at his destination.

It is urged by the plaintiff that the defendant did not stop his vessel at Niagara, when the plaintiff landed, but passed his vessel slowly along the wharf (the usual landing place) at Niagara, put out a gangway, which extended over the wharf, and which was raised two feet above the wharf along which the plaintiff and others were passed from the boat to jump ashore: if this be so, then this conduct was *primâ facie* a violation of the defendant's duty to his passengers. It is urged on the other hand by the defendant, that the boat did stop at Niagara, but that the plaintiff prematurely jumped ashore from the gangway, and that the plaintiff is therefore chargeable with all the injury which he brought upon himself; and that even if it be as the plaintiff alleges, that the defendant would not stop his boat to let the plaintiff land, the plaintiff is not nevertheless entitled to recover, because he was not obliged to accept of this method of landing, but having adopted it, he adopted with it also all the risks attending it.

It appears to me that the evidence shews the purser acting for the defendant, told the plaintiff and others, on the way to Niagara, he would not stop the boat at Niagara, because he was behind time; and that after some difficulty, he said he would slacken the speed of the boat as it passed the wharf, and shove out a gangway, so as to let the plaintiff and others land in that manner; and all this he did do. But it so happened that he did very shortly after this stop the boat at Niagara. But all this is of no consequence, if he before told the plaintiff he would not stop, and if the plaintiff acted upon that communication and belief in landing as he did. There

is evidence, however, that before the plaintiff did land, it was understood that the boat would stop at the wharf as usual. But I think the weight of evidence shews that this was not told to the plaintiff, and the plaintiff acting upon such information as he had, went ashore by the gangway. I think the defendant's duty *primâ facie* was not performed; but it was contended that the original contract and duty (assuming them to have been established as the plaintiff alleged), were wholly put an end to by the special arrangement which was made, which it was said, dispensed with their performance, and substituted a new engagement in their stead, and that the defendant faithfully performed every part of this new obligation, and was guilty of no misconduct or negligence in any way whatever, in fulfilling it; and it was in effect also contended, that as this substituted arrangement was more dangerous in its nature, that the plaintiff necessarily assumed the inseparable risks accompanying it.

It is a question, therefore, whether such a new and substituted arrangement was made? No doubt it might have been made, and if it were, the plaintiff ought to be confined to it; but I think the evidence does not shew the plaintiff made any such bargain dispensing with the ordinary and proper performance of the defendant's duty, although there is in my opinion very strong evidence that the plaintiff did submit to be landed by the gangway, while the boat was in motion, because he could do no better, but it can scarcely be believed that the plaintiff really desired and preferred this method of landing to the usual and proper one of stepping on to the wharf from the boat when it was made fast to the shore.

If the plaintiff did not voluntarily accept of the landing by the gangway, the defendant in departing from the proper course of landing his passengers, must bear the responsibility of the increased dangers of the different method which he adopted. Suppose the defendant, instead of passing slowly along the wharf as he did, had anchored out in the river, and had told the plaintiff that he would not put him ashore, but that he might get there as he best could; and the plaintiff swam ashore; could it be said this was safely and securely landing the plaintiff at Niagara? or, if the plaintiff were injured in swimming ashore, could it be said that the defen-

dant was exempt from liability, because the plaintiff was not obliged to swim ashore, or could it be said that swimming ashore was a merely voluntary act of the plaintiff? or suppose a passenger on board of an ocean steamer from New York to Liverpool, but calling at Halifax, were to take passage from New York to Halifax, and was told by the captain, when he got to Halifax, that the vessel would not go nearer than ten feet to the wharf: would this person have to go to Europe, in case it might be said his jumping ashore was a voluntary act? and if he did jump ashore and was injured, could it be said he had no remedy against the captain, because he ought rather to have gone to Europe than to run the risk of injuring himself by jumping? This would be really setting up the defendant's own misconduct as a justification for the very wrong which is complained of. Many other cases of a similar kind might be put; and yet these do not differ but in degree from the present case.

It was important for the plaintiff to be landed at Niagara; it was his right to be landed there; but not from a boat in motion, and from a gangway run out, from which he had the privilege of jumping ashore.

It is important that the public should be protected against the wilfulness, perverseness, or neglect of those in whose power travellers are temporarily placed, and against whose power or influence they cannot successfully contend; and we think a new trial should be granted, because the verdict is contrary to the weight of evidence: and, speaking for myself alone, I think the evidence for the defendant should have been of that clear and affirmative character, for the purpose of establishing that the plaintiff heedlessly and of his own mere notion, jumped ashore as he did; or that after his communications with the officers in charge, he voluntarily adopted this way of landing which he took to get ashore, and that the defendant was discharged from the performance of his primary and positive duty as a common carrier, to land his passengers safely and securely in the ordinary way.

There should be a new trial, but upon payment of costs.

Per cur.—Rule absolute.

PRINCE V. MOORE.

*Ejectment—Contract for sale of land—Possession entered into by purchaser—
Default in payment by purchaser—Tenant at sufferance.*

Plaintiff, being in possession of land as assignee of a mortgagee, under a mortgage upon which default had been made, contracted to sell the mortgage to defendant for \$500: \$200 at date of agreement, and \$300 on 1st of April following; at which time the plaintiff agreed to have the mortgage assigned to defendant. On payment of the \$200, the defendant was let into possession by plaintiff. Default was made by defendant in payment of the second instalment of \$300, and plaintiff gave notice to defendant that he was ready to assign the mortgage on payment of the amount due, and that if the money were not paid defendant would be ejected. Defendant refused payment and said he would stand a suit and claimed a deed in fee with covenants for title.

Held, that by default in payment the tenancy at will was converted into a tenancy at sufferance, and that as well on account of defendant being only a tenant at sufferance as on account of his disclaimer of the plaintiff's title, he was not entitled to a demand of possession before action brought, and also that the tenancy at will would have been determined by the demand of payment under the threat of ejecting the defendant and the default of the defendant to pay.

This was an action of ejectment tried at the Essex spring assizes, one thousand eight hundred and sixty-four, before the Honourable the *Chief Justice* of the Common Pleas.

The notice of claim was as follows :

“Take notice, that the nature of the claim to the lands mentioned in the writ in this cause, intended to be set up by the claimant, is that he, the claimant, is the person through whom, or those through whom he claims the defendant obtained possession of the said lands, whereby defendant is estopped from disputing said claimant's title thereto. Dated, the 29th day of March, A. D. 1864.”

The notice of defence was as follows :

“Take notice, that the defendant besides denying the title of the plaintiff, asserts title in himself, under an agreement of sale of the lands and premises claimed herein, and the defendant claims to hold possession of the said lands, under the said agreement, having performed, and being ready and willing to perform all things necessary to be performed under the said agreement by him the said defendant. Dated 15th April, A. D. 1864.”

The plaintiff proved that in January, one thousand eight hundred and sixty-three, being in possession of the land as assignee of the mortgagee, under a mortgage in default, he agreed to sell the mortgage to the defendant for five hundred dollars, and plaintiff and the original mortgagee gave defend-

ant their bond, conditioned as follows :—" Now, the condition of this obligation is such, that if the said A. Prince and Chas. Prince do, upon payment by the said William Moore to them, of the sum of five hundred dollars in manner following, namely : the sum of two hundred dollars at the time of the delivery of these presents (the receipt of which is hereby acknowledged), and the remainder of the said sum (with interest on the whole from the twenty-seventh day of September last, at the rate of ten per cent. per annum, until payment), on the first day of April next, procure the said mortgage for nine hundred dollars to be well and truly assigned and transferred to the said William Moore, free from all incumbrances whatsoever, then this obligation to be void, otherwise to remain in full force and virtue." Defendant paid two hundred dollars, and was let into possession, and has since occupied. He made default in the payment of the remainder. Shortly before the commencement of this action, the plaintiff's attorney notified defendant that the mortgage would be assigned immediately on payment of the overdue instalment, and that if the instalment was not paid, defendant would be ejected. Defendant refused to pay, alleging that he was entitled to a deed in fee simple, with covenants for title, and said he would stand a suit ; there was a written demand of possession served on the same day as, and shortly before the service of, but two days after the issue of the writ. The defendant's counsel objected that defendant having been let into possession as a purchaser, was entitled to a demand of possession before action brought, and that no sufficient demand was proved.

To which the plaintiff replied, that the defence is not set up in defendant's notice, as he only claimed to hold under the bond, and the bond made no reference to the possession ; and even if he had shewn a right to the possession, he could not claim a demand of possession after default in payment of the purchase money.

The learned judge directed a verdict for the plaintiff, subject to the opinion of the court on the questions raised.

Prince, for the plaintiff, supported the verdict, and contended that on the facts stated, no demand of possession was

necessary. He cited *Robinson v. Smith*, 17 Q. B. U. C. 218; *Robertson v. Slattery*, 10 Q. B. U. C. 498.

Harrison, contra.—The defendant was not a tenant at sufferance, but at will, and the plaintiff's will should have been determined before action brought by a demand of possession or other distinct act. *Doe dem Lemoine v. Vancott*, 5 O. S. 486; *Doe dem Mann v. Keith*, 4 O. S. 86; *Doe dem Green v. Friesman*, 5 O. S. 661; *Doe dem Sheriff McGillivray*, 6 O. S. 189.

ADAM WILSON, J.—In the case of *Robertson v. Slattery*, it is said by *Draper*, J., in giving the judgment of the court, —“Admitting, for argument's sake, that the defendant was at one time tenant at will to the plaintiff, under the agreement made in 1847 or 1848, he had failed in making the payments, and was therefore liable to be dispossessed without notice [*Doe dem Stodders v. Trotter*, 1 U. C. 310]. His subsequent proposal to make a new treaty, coupled with his previous failure, was in my opinion abundant, if not conclusive evidence, that the tenancy at will was at an end, and that he was merely tenant at sufferance, and consequently not entitled to a demand of possession.” *Robinson v. Smith* is to the same effect.

The cases cited for the defendant have no direct application to this case, but the case in 17 Q. B. 218 is almost precisely like the present one, and there it was held that the entry of the defendant with the knowledge of the plaintiff, but particularly after failure to make his payments as provided by the bond, entitled the plaintiff to eject him without notice. Here the plaintiff let the defendant into possession under his agreement to purchase, and no doubt the defendant became a tenant at will. The defendant fell in arrear with his payments; he was duly notified if he did not pay he would be ejected; he refused to pay and said he would stand a suit. Here was abundant evidence of the termination of the tenancy at will before suit brought.

“Unless you pay what you owe me I shall take immediate measures to recover possession of the property,” addressed to a tenant at will, by the party entitled to the fee, is a sufficient

determination of the will. Doe dem. Price v. Price, 9 Bing. 356. The claim of the defendant also that he was entitled to a deed in fee simple was a disclaimer such as of itself deprived him of the right to require a demand of possession, as appears by the authority just referred to, the facts of which case are not unlike the facts of this one.

We think the postea should be delivered to the plaintiff.

Per cur.—Postea to plaintiff.

EADUS V. DOUGALL.

Bailiff—Case—By whom maintainable.

The defendant, who was the attorney for an execution creditor, and who indemnified the bailiff who executed the *fi. fa.*, is not responsible over to an assistant whom the bailiff employed, for damages recovered against such assistant by a person who claimed the goods seized as his property. As to references in one count to another.

The declaration stated that before the committing of the grievances, one Armstrong, by the defendant as his attorney, recovered a judgment in the Court of Queen's Bench against Balfour & Borlam. That Armstrong, by the defendant as his attorney, issued upon the judgment a *fi. fa.* against the goods of Balfour & Borlam, endorsed to levy, &c. That the defendant, as such attorney, delivered the writ, so endorsed, to the sheriff to be executed. That the sheriff made and delivered his warrant to one Wharton, as his bailiff, to cause to be made of the goods of Balfour & Borlam the damages and costs. That while Wharton had this warrant, and during the currency of the writ, the defendant acting as attorney for Armstrong, informed and falsely represented to Wharton, as bailiff, that certain goods then in the possession of one Burns, and naming and describing the said goods, and telling Wharton where the same were to be found, were the goods of Balfour & Borlam, or of one of them, and were liable to seizure under the writ, and thereupon ordered and directed Wharton as bailiff, and as his mandatory or agent, to levy upon and sell the said goods under the writ and warrant, when in truth and in fact the said goods were not the goods of Balfour & Borlam,

or of either of them, liable to be levied upon. That Wharton, under the warrant, and while the writ and warrant were in force, employed the plaintiff to assist him in levying upon and safely keeping the said goods, and the plaintiff as the assistant and servant of Wharton, and under his authority did jointly with Wharton, (believing the representation of the defendant to be true) levy upon the said goods, and the plaintiff, by the directions of Wharton and under his authority, and as custodian for the sheriff and Wharton, did safely keep the said goods until the sale, as was necessary to carry out the defendant's mandate. That afterwards Burns sued the now plaintiff, the now defendant and Wharton, and in consequence of the said levy and keeping of the said goods, recovered a verdict for damages and costs against the now plaintiff and Wharton, on which verdict judgment was entered and execution issued against the plaintiff and Wharton, and the plaintiff was compelled to pay and did pay the full amount of the damages and costs to Burns.

2nd count—That after the delivery of the said execution against the goods of Balfour & Borlam, as in the first count mentioned, the defendant induced the sheriff to make the warrant, in the first count mentioned to Wharton, as Armstrong's special bailiff, and after the delivery of such warrant, as in the first count mentioned, and after the direction and representation to Wharton to levy upon the goods as in the first count mentioned, the defendant then being the attorney of Armstrong, undertook and agreed to indemnify and save harmless, as well Wharton and the plaintiff as his assistant, of and from all damages and costs which Wharton or the plaintiff, as Wharton's assistant, should be put to by reason of the said seizure or incident thereto of the goods, as in the first count mentioned, under the warrant and writ. And the plaintiff says that relying upon the indemnity and believing that the said goods were the property of Balfour & Borlam, or one of them, he assisted Wharton in taking and keeping possession thereof, and afterwards Burns, as in the first count mentioned, brought an action, &c., and recovered, &c., and the plaintiff was obliged to pay and did pay to the said Burns the damages and costs so recovered out of the plaintiff's own sole and individual purse.

The defendant demurred to both counts. The causes of demurrer to the first count were—

1st. That the plaintiff was only a servant or assistant of Wharton the bailiff; that the bailiff's duty was to take instructions from the sheriff only who was responsible for his acts, and he was not bound to act upon the order, representation or direction of the defendant, and no implied promise to indemnify could arise therefrom, and that as such representation is not stated to have been made fraudulently, the action cannot be maintained.

2nd. That the plaintiff is a stranger to any promise to Wharton, and cannot take any advantage thereof, even if an implied one has arisen or could have arisen to Wharton, and no damage has happened to Wharton.

3rd. The sheriff is alone entitled to maintain such an action as this if he had been damnified.

4th. That the plaintiff's remedy, if he had any, is against the sheriff or Wharton.

5th. It is not alleged the goods seized were the goods of Burns, nor for what specific cause, arising out of the seizure, judgment was recovered against the plaintiff.

The objections to the 2nd count were—

1st. That Wharton, although a special bailiff, was not bound to obey the directions of the defendant, &c., (as in the first exception to the first count the objection then continues,) that the express promise to indemnify is alleged to have been made after the representation, &c., to the bailiff, and no consideration is shewn for such promise. It is not stated that if the bailiff would so act the defendant would indemnify him, nor is any other consideration shewn, the promise therefore is *nudum pactum*.

2nd. Same as second to first count.

3rd. It is not shewn the goods mentioned were not the goods of Balfour & Borlam, and were not liable to seizure, nor for what specific cause judgment was recovered by Burns against the plaintiff.

The plaintiff has joined in demurrer.

In last term *Harrison* supported the demurrer and contended that the facts disclosed no cause of action whatever

against the defendant. He referred to *Moodie v. Dougall*, 12 C. P. U. C. 555; *Humphreys v. Pratt*, 5 Bligh. N. S. 154; *Evans v. Collins*, 5 Q. B. 804; *Childers v. Wooler*, 6 Jur. N. S. 444; *Cave v. Mills*, 6 L. T. N. S. 650; 7 H. & N. 913 S. C.; 8 Jur. N. S. 363 S. C.

Jellett, for the plaintiff. The first count is in case; this plaintiff is the person who has been damnified, and is therefore the person entitled to sue. Wharton has not been damnified and has therefore no right of action. The second count states a promise by defendant to plaintiff. If not fully stated, defendant cannot now object to it as he has not demurred for this cause. He referred to some of the previous cases and also to Addison on Contracts, 940-1; *Martyn v. Hind*, Cowper, 437; *Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. in Exch. Ch. 337.

ADAM WILSON, J.—All other questions as to the sufficiency of the first count, have been already decided by this court, in the case of *Moodie v. Dougall*, 12 C. P. U. C. 555, but the one, how far a plaintiff circumstanced as this plaintiff is, can maintain the action in the form in which it is now presented, for it did not arise in that case.

The court on the former occasion decided that the then plaintiff, the sheriff, not having been sued at any time by Burns, nor having been made responsible in any way, nor having ever paid any money, and so in truth never having been damnified, could not maintain an action against this defendant, on his alleged misrepresentation, for the indemnity of the bailiff, who had been sued, and who only was damnified.

In this case, the present plaintiff rests his right of action against the defendant upon the fact that, the plaintiff having acted jointly with Wharton in making the levy [believing the defendant's representations to be true], is entitled to sue the defendant upon his representations to Wharton, for the purpose of indemnifying himself for the damages he has sustained by the action which Burns brought against Wharton, and against both this plaintiff and defendant.

It may be conceded that Wharton, if damnified, could have maintained an action against the defendant; for the count

expressly declares that the defendant advised and directed him as bailiff, and as the defendant's mandatory and agent, to levy, &c.

The question is, whether this plaintiff, as Wharton's assistant, can do so upon what passed between the defendant and Wharton?

The allegation that the plaintiff believed the representation of the defendant to be true, does not shew the defendant made any representation to him, or in his hearing, so as to be acted upon by him or otherwise; and for anything that appears, the plaintiff may not even have heard of such representation from Wharton.

There can be no question that whatever remedy this plaintiff may have against the defendant, it cannot be upon or in respect of a contract, for there is no privity between them to confer such a right of action.

The plaintiff's remedy, if any, is in case for the wrong he has sustained, and if this claim can be brought within the principle of *Langridge v. Levy*, 4 M. & W. 337,—“That as there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured,”—the plaintiff can sustain the count; otherwise he cannot.

In that case the gun which burst had been warranted sound by the defendant, to the plaintiff's father; it was bought by the father from the defendant, for the use of himself and his sons, the warranty was false and fraudulent, and much stress was laid on these facts, for *Parke, B.*, says, “The defendant has knowingly sold the gun to the father, *‘for the purpose of being used by the plaintiff,’* and has knowingly made a false warranty, that it might be done in order to effect the sale; and the plaintiff on the faith of that warranty, and believing it to be true, used the gun, and thereby sustained the damage.”

To apply these facts to this count; does it appear here that this defendant made the representation to Wharton, *for the purpose of its being acted upon by the plaintiff*? If it did, the plaintiff would have brought himself within the limits of

that case : but we think it does not. If Wharton had represented to the defendant that he intended to employ an assistant, and that this assistant might require protection as well as himself; and if the defendant had said to Wharton, that he would be answerable for any damage which the assistant might suffer from acting upon his representation : the defendant would, if the assistant had acted upon his representation, believing it to be true, and had sustained damage in consequence thereof, have been answerable for the damage sustained by the assistant, as for a deceit and misrepresentation.

But because defendant made a misrepresentation to Wharton, is no reason why he should be liable to an action in respect of it to Eadus, to whom and for whom he made no representation at all ; for at this rate he might, by Wharton's act, who might have called out the whole *posse comitatus*, have rendered himself liable to a suit at the instance of everybody who had been called out, and aided, and had suffered damage, although they had never known of the defendant's representation, or knowing it, had not acted upon it.

In no case has a representation not made with the view of a particular person or persons acting upon it, been held to constitute a legal liability, although that person, or those persons has or have sustained damage in consequence of it.

Suppose a person were to say to another, I warrant this horse safe and free from vice, and easily managed—in consequence of which such other bought it; and suppose that he in his turn sold the horse to a third person, and said to him, I bought the horse from such-a-person, and he represented it to me as safe and free from vice, and easily managed; and this third person sustained damage, by reason of the horse being vicious and difficult to manage: can it be contended that such third person could recover against the original vendor for his misrepresentation and deceit to his own vendee?

If this could be so, it would give rise to the numerous difficulties so strongly pressed upon the court by the very able counsel who appeared for the defendant in the case of *Langridge v. Levy*, in the Court of Exchequer, 2 M. & W. 529.

In *Bedford v. Bagshaw*, 4 H. & N. 548, *Bramwell*, B. expresses clearly this opinion:—It would be a strong thing

to hold, that if a man makes a verbal untrue statement to any person, as for instance, that the shares in a particular company are a valuable security; if that person buys and recommends his friends to buy, that he is to be liable to any one who buys on the faith of such representation: but it is not a bad rule that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequences may be." [This last language is not approved of by V. C. *Wood*, in *Barry v. Croskey*, 2 *Johnson & Hemings*, 21.]

Pollock, C. B., also says:—"I am not prepared to lay down as a general rule, that if a person make a false representation, that every one to whom it is repeated, and who acts upon it, may sue him. But it is a different thing where a director of a company procures an artificial and false value to be given to the shares in a company which he professes to offer to the public. Generally, if a false and fraudulent statement is made, with a view to deceive the party who is injured by it, that affords a ground of action: but I think there must always be this evidence against the person charged, viz., that the plaintiff was one of the persons to whom he contemplated that the representation should be made, or a person whom the defendant ought to be aware he was injuring or might injure."

Now this plaintiff does not shew he was acting under what the defendant had represented to Wharton, or any circumstances which shew us that the defendant had any other person whatever in his contemplation when he communicated with Wharton. He might have been willing to entrust himself to Wharton's discretion, but scarcely to that of anybody who might be casually called upon by Wharton to aid him in the execution of the writ.

The count shows rather that the plaintiff did not do the act by the defendant's representation; for it says the plaintiff, as the assistant and servant of Wharton, and under his authority, did jointly with Wharton make the levy, and that by the directions of Wharton and under his authority, and as custodian for the sheriff and Wharton, did keep the goods, &c.

The count does not shew, either, that there was any necessity for Wharton to employ the plaintiff.

See Gerhard v. Bates, 2 El. & Bl. 476, and the other numerous cases on the subject of actions for false or fraudulent misrepresentation.

The second count is in contract, for it alleges that the defendant undertook and agreed to indemnify and save harmless, as well Wharton as the plaintiff, his assistant, of and from all damages, &c., and we see no reason why such an engagement should not be good, as it is laid.

This count is excepted to however, because it is said it does not shew that the goods were not the goods of Balfour and Borlam, and that they were not liable to seizure. This difficulty arises from the compression of the pleader : by referring to the statements in the first count, instead of repeating them in the second, and by not very clearly indicating how much of the first count he intended to be thus incorporated in the subsequent count.

The plaintiff says, in the second count, that after the delivery of the writ to the sheriff, as in the first count mentioned, and after the making and delivery of the warrant to Wharton, as in the first count mentioned ; and after the direction and representation to Wharton to levy upon and seize the goods as in the first count mentioned : the defendant undertook and agreed to indemnify Wharton and the plaintiff against all damages, by reason of the said seizure of the goods in the first count mentioned.

Now, the goods "in the first count mentioned," are described in that count as follows : That the defendant falsely represented that certain goods then in the possession of Burns, &c., were the goods of Balfour & Borlam, and were liable to seizure ; whereas they were not the goods of Balfour & Borlam, and were not liable to seizure : and the levy is spoken of as having been made upon the *said goods*.

It appears by the second count, that the damages to the plaintiff arose after the direction to levy upon the goods, *as in the first count mentioned* ; and that the act complained of, and for which Burns recovered his judgment, was "in consequence of the seizure as aforesaid," that is, of the goods as Balfour & Borlam's goods.

I am inclined, then, to think that enough appears in the

second count, to shew that the goods there referred to were taken as the goods of the judgment debtors, when they were not so.

I have had some doubt as to the certainty and extent of these references from the one count to the other, and however desirable it may be to shorten the pleadings and avoid the error of prolixity, it should not be attempted by the commission of a greater evil, arising from uncertainty and obscurity as to what is meant to be stated, and as to the meaning of what is stated.

In *Phillips v. Fielding*, 2 H. Bl. 131, the reference from one count to another, when the statements are lengthy, is recommended.

We are of opinion the first count is not good, for the reasons already given; the judgment will therefore be for the defendant on this count; and for the plaintiff on the second count.

Per cur.—Rule accordingly.

WELLER V. HARTGRAVES ET AL.

Ejectment—Possession—Voluntary conveyance—Subsequent purchaser for value.

In an action of ejectment brought to try the title to parts of lots four and five in broken front and first concession of Sidney, both parties claimed title through one N. M. The defendant contended that a deed from N. M. to C. & J. M., dated 12th of September, 1838, was voluntary, and was therefore void. The jury having found for the plaintiff, upon motion for a new trial, *Held*, that the deed from N. M. to C. & J. M. could only be void as against a subsequent purchaser for value, and that inasmuch as there was evidence to shew that C. & J. M. were in possession on the 31st of August, 1839, and none which proved either the grantor or grantee to have been in possession when N. M. conveyed to A. H. M., (through whom defendants claimed,) the deed to A. H. M. was therefore void, and he was consequently precluded from saying the deed to C. & J. M. was void because it was voluntary.

This was an action of ejectment brought to recover possession of parts of lots four and five in the first concession, and in the broken front concession of the township of Sidney, and was tried before *Hagarty, J.*, at the spring assizes held at Belleville in 1863. A verdict was rendered for the plaintiff.

Both parties claimed through Nathan Marsh, the eldest son and heir at law of Archibald Marsh, the eldest son and heir at law of Matthias Marsh the patentee of the Crown.

The matters principally in dispute at the trial were, 1st, whether the deed from Nathan Marsh to Charles and James Marsh, dated the 12th of September, 1838, was a voluntary conveyance or for valuable consideration; 2ndly, whether Charles and James Marsh, or Adam Henry Meyers, the defendants' landlord were in possession of the land when this conveyance was made, and 3rdly, whether Meyers was in possession on the 21st day of August, 1839, when Nathan Marsh conveyed to him.

In Easter Term 26 Vic., *Wallbridge* obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the ground that the verdict was contrary to law and evidence, the weight of evidence, and the judge's charge, and for misdirection and surprise and upon affidavits on the following grounds:

1st. The evidence shewed the deed from Nathan Marsh, the heir at law of the patentee, to Charles and James Marsh, to have been given whilst both grantor and grantees were out of possession, and the defendant Meyers in possession claiming as owner.

2nd. That the deed from the said Nathan Marsh to the said Charles and James Marsh was a voluntary deed, and bad in law against a purchaser for a valuable consideration.

3rd. That the plaintiff set up no title at the trial having any merits other than as claiming through the titles of the said Charles and James Marsh.

4th. That the defendant Meyers was a purchaser for a good and valuable consideration.

5th. That the defendants were taken by surprise at the testimony given by Robert Weller, Stephen Young and Chas. Saylor, which testimony contradicts the testimony of Richard Keene the defendants' witness.

6th. That the affidavits shew the testimony of defendants witness Keene to be true.

7th. That the judge should have told the jury that the deeds from Nathan Marsh to Charles and James Marsh were voluntary and void as against a purchaser for valuable consideration.

The case was argued last Easter Term.

M. C. Cameron, Q. C., shewed cause, and contended that the validity of the deed of Marsh to Charles and James Marsh, depended upon the question as to whether they were in possession of the land when they took the conveyance; that on this the evidence was conflicting, but the jury found they were in possession and there is good evidence to support their view; that whether it was voluntary or not, was also a question for the jury; there was evidence of consideration, and they found it was given for valuable consideration; that the title set up by the plaintiff was a good legal title, if his deed was not void on either of the above grounds; that the defendant was not a purchaser for valuable consideration, if adequacy of consideration was the question, for considering the actual value of the land, \$100, paid by Meyers, was about as nominal as \$2, paid by Charles and James Marsh; that as to surprise, the defendants seem to have been prepared to meet the case set up by plaintiff, and the new matter on oath submitted to the court, has been met and answered by the plaintiff. There was no misdirection, for there was evidence of consideration, and as the deed from Nathan Marsh to Meyers was void, because neither grantor nor grantee were in possession, he was not a purchaser who could impeach the former deed of Nathan for being voluntary.

D. B. Read, Q. C., in support of the rule, contended that the weight of evidence shewed that Meyers was in possession of the land in 1838, when Nathan Marsh conveyed to Charles and James, and that the evidence showed his possession arose from a recovery in ejectment, upon which the sheriff put him into actual possession in January or February, 1838, and that his tenant Keene kept actual possession till April, 1839, and Meyers himself afterwards. That if so, and the evidence clearly made it out, the deed from Nathan Marsh to Charles and James was void, for neither grantor nor grantees were in possession, and there was no consideration for it. That Meyers was a purchaser for valuable consideration, and there was some evidence that Meyers was in possession when the conveyance was made; that although the evidence was conflicting as to the possession in the year 1838, the affidavits put in by the defendants shew beyond all doubt that Keene

was in possession as care taker for Meyers during the whole of the year 1838, after he took possession in February; that the learned judge should have told the jury that the conveyance, from Nathan Marsh to Charles and James, was in fact voluntary, and was void against his conveyance to Meyers, which was for value.

JOHN WILSON, J.—The plaintiff's right to recover depends upon the validity of the conveyance from Nathan Marsh to Charles and James Marsh, dated the 12th of September, 1838. It was impeached on two grounds, 1st. That it was voluntary. 2ndly. That neither grantor nor grantees were in possession. As regards the first ground, it was void only as against a subsequent purchaser for value, but there is evidence to shew that on the 31st August, 1839, Charles and James Marsh were in possession of the land, and none to shew that either the grantor or grantee was in possession when Nathan Marsh conveyed the land to Meyers. If so his deed was void, and he is precluded from saying Nathan's deed to Charles and James Marsh was void as having been voluntary.

Then as to the second point, the evidence is not only conflicting but contradictory, as to who was in actual possession of the land from April, during the rest of the year 1838. The witnesses for the plaintiff say Charles and James Marsh were in possession. The defendants' witnesses say, Meyers was in possession by Richard Keene, his care taker, and the Marsh family were not. The affidavits filed on moving the rule and answering it, which we have carefully read, present the same contradiction, the preponderance in number and circumstances being perhaps with the defendants.

If the verdict had been the other way we should not have disturbed it. The jury were properly directed, and they were to judge which witnesses were to be believed and which not. They have exercised their judgment in favor of the plaintiff, and we see no good reason for setting aside their verdict. The rule will therefore be discharged.

Per cur.—Rule discharged.

COOPER v. WELLBANKS.

Survey—Concession line.

A concession line having been laid out by a Provincial Land Surveyor under instructions from the Commissioner of Crown Lands, upon the petition of the corporation of the township, based upon the assumed application of one half the resident land holders to be affected by the survey, the petition being in the following words:—"To the Reeve and Councillors in council assembled,—We, the undersigned freeholders in the 2nd and 3rd concession south side of Black River, west of Point Travers, in Marysburg, beg to ask your honourable body to petition the government to send a surveyor to establish the concession line according to law between the 2nd and 3rd concession, commencing at the township line running towards South Bay, and by complying with this request your petitioners in duty bound will ever pray. Milford, April 14th, 1860." On receipt of this petition the corporation passed a resolution in these words: "Resolved, That in accordance with the statute 18 Vic., ch. 83, sec. 8, and the prayer of the petition of a majority of the householders to be affected thereby, that there be a survey made between the 2nd and 3rd concessions south of Black River from the township line of Athol, to lot number one in the third concession of Marysburg." On the 29th of May, 1860, the corporation of the township of Marysburg petitioned his Excellency to cause this survey to be made, and on the 9th of July, 1860, the Honourable the Commissioner of Crown Lands gave instructions to a Provincial Land Surveyor to survey and establish the concession line between the 2nd and 3rd concessions of the township of Marysburg, commencing at the township line, and running towards South Bay in accordance with the provisions of the Provincial Statute, 12 Vic., ch. 35, and 18 Vic. ch. 83."

Held, that the application to the corporation, and the resolution by the corporation not being such as the statute requires to authorise an application to the government to cause the survey to be made, that the survey made by the instructions of the Commissioner of Crown Lands, dated the 9th of July, 1860, was therefore unauthorised.

This was an ejectment for the north part of the east half of Lot No. 7, west of Point Travers, in Block No. 15, in the township of Marysburg, in the county of Prince Edward, which was tried before *Hagarty, J.*, at the fall assizes of 1863, and in which the concession line between the 2nd and 3rd concessions of the township was the point in dispute. The plaintiff claimed that this line was where Mr. Emerson, a Provincial Land Surveyor, had traced and established it in the year 1860, under instructions from the Honourable the Commissioners of Crown Lands, upon the petition of the corporation of the township based upon the assumed application of one half of the resident landholders to be affected by the survey. This application was signed by the plaintiff and nine others, and was in these words:—"To the Reeve and Councillors in Council assembled,—We, the undersigned freeholders, in the second and third concessions south side Black River, west of Point Travers, in Marysburgh, beg to ask your honourable

body to petition government to send a surveyor to establish the concession line according to law between the second and third concessions, commencing at the township line running towards South Bay, and by complying with this request your petitioners in duty bound will ever pray.

Milford, April 14th, 1860."

On the receipt of this the corporation, "*Resolved*,—That in accordance with the 18 Vic., cap. 83, sec. 8th, and the prayer of the petition of a majority of the householders to be affected thereby, that there be a survey made between the second and third concessions south of Black River, from the township line, Athol, to lot number one in the third concession of Marysburgh." Council-room, Milford, 21st April, 1860.

On the 29th of May, 1860, the corporation of the township of Marysburgh petitioned his Excellency to cause this survey to be made. On the 9th of July, 1860, the Honourable Commissioner of Crown Lands gave instructions to John Emerson, Esquire, a Provincial Land Surveyor to survey and establish the concession line between the second and third concessions of the township of Marysburgh, commencing at the township line and running towards South Bay, in accordance with the provisions of the Provincial Statute, 12 Vic., ch. 35, and 18 Vic., ch. 83.

In October, 1860, Mr. Emerson reported the survey of this line to the Commissioner of Crown Lands, who, on the 12th of November, 1860, certified the survey to the corporation of the township, and that it had been performed in conformity with his instructions and to his satisfaction.

At the trial the title of both parties was admitted, and the sole question was, whether this line or the one contended for by the defendant, which was two chains eighty-five links south of it at the east side of the land in dispute, and two chains ninety-three links south of it at the west side, was the line between the second and third concessions.

The defendant gave some evidence of there being a monument on the Marysburgh side of the town line; also of the occupation on the second concession going to the travelled road, and he gave some evidence to account for the blazes on defendant's land, where the plaintiff claims the line.

The defendant, in his cross-examination of the town clerk, proved that over half of the ten persons who signed the application to the corporation for the survey, had no deeds for their lands, and that eleven or twelve freeholders who would be affected by the survey had not signed the application, but of these last, four did not come to the line although they lived in the second concession.

The plaintiff, in reply, proved the survey under the authority of the commissioner and gave evidence to shew that it was correct, and contended that this survey was conclusive and ought to govern.

Wallbridge, for the defendant, objected that the petition was not from half the resident landholders, and did not ask for the establishment of stone monuments at the front and rear angles of the lots according to the 63rd section of the Surveyor's Act. That the resolution of the corporation of the township did not follow the act.

The plaintiff pressed the learned judge to rule on the legal effect of Emerson's survey; and subject to the objection of Mr. *Wallbridge*, he directed the jury that this survey must govern, unless Emerson, willfully or through carelessness, ignored original monuments in the work, on the ground of which he saw no evidence, and he refused to receive evidence offered by defendant that Emerson acted, as they said, in a partizan spirit, or heard or omitted to hear certain witnesses.

In Michaelmas Term last *Fitzgerald* obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted upon the grounds that the verdict was contrary to law and evidence, and upon the ground that the learned judge misdirected the jury in charging them that the line between the second and third concessions south of Black River, as run by Mr. Emerson, should be deemed and taken to be the true line between the said concessions, whether correctly run or not, and upon the ground that the learned judge rejected evidence which was offered to shew that Emerson was guilty of improper conduct in running said line, in refusing to hear evidence favorable to the parties interested in the second concession, and in hearing only such evidence

as was offered by parties residing and interested in the lands on the third concession, and that Mr. Emerson acted partially.

During last Hilary Term *C. S. Patterson* shewed cause, and contended that the survey by Emerson having been performed by the instructions and under the authority of the government, was binding and final by the Con. Stat. U. C., cap. 93, secs. 6, 8, 11; Municipal Act, secs. 1, 5; *Hunter v. Baptie et al.* 23 U. C. Q. B. 43; *Ovens v. Davidson*, 10 C. P. U. C. 302.

S. Richards, Q. C., contra, contended that the patents of the second concession speak of the lands as being in the same range as Hallowell, now Athol, and that the line, as contended for by the defendant, so recognized it; that the patent for lot number fifteen described it as a four-sided lot, the defendant's survey made it so, while the plaintiff's line made it five sided; that the survey was unauthorised, because it was not applied for by the resident landholders, but by freeholders who were not described as resident; that half did not apply for it or profess to apply for it; that the prayer of it is not in the terms of the statute. He contended that the resolution of the corporation was defective in its statements and did not request that to be done which the statute authorised to be done, and that the survey was not therefore binding.

JOHN WILSON, J.—The Consolidated Statutes of Upper Canada, cap. 93, and the Con. Stat. of Canada, cap. 77, provide, "that where some of the concession lines or parts of concessions were not run in the original survey, or have been obliterated, the corporation of any township may adopt a resolution on application of one half the resident landholders to be affected thereby, that it is desirable to place stone or other durable monuments at the front or at the rear, or at the front and rear angles of the lots in any concession or range, or part of a concession or range in their township and may make application to the governor, requesting him to cause any line to be surveyed, and marked by permanent stone boundaries under the direction and order of the Commissioner of Crown Lands, in the manner prescribed by the

act respecting the survey of lands, and that the lines or parts of lines so surveyed and marked, shall thereafter be the permanent boundary lines of such concession or parts of concessions to all intents and purposes whatever."

When a survey of this kind has been performed, the court will presume, that every thing which was done had been rightly done, until the contrary shall appear. Here we have before us evidence to show that the application for this survey was made, not by one half the resident landholders to be affected by the survey, but by *ten freeholders*, over half of whom had no deeds for their lands, and that eleven or twelve freeholders, who would be affected by the survey, were not parties to the application. The application itself does not describe the applicants as freeholders, and does not allege the want or obliteration of the original concession line or pray for the placing of monuments at any of the angles of the lots. The resolution of the corporation describes them as a majority of the householders to be affected thereby, not as one half of the *resident landholders*, and does not speak of placing stone monuments.

In the absence of such an application and such a resolution as the statute requires, to authorize an application to the government to cause a survey like the one before us to be made, we think this survey was unauthorized, and the learned judge misdirected the jury in this respect. He might very properly have left it to the jury to say which line, under all the evidence, was the original line, or in the place of the original line.

We have not felt it necessary to dispose of the other point raised, as to the right to impeach the conduct of the surveyor. We see nothing in the evidence to throw the least doubt upon it.

We think there ought to be a new trial.

Per cur.—Rule absolute for new trial.

REYNOLDS (SHERIFF) V. PEARCE.

*Absconding debtor—Sheriff—Action brought to recover rent by under the statute—
Evidence—New trial.*

In an action brought by a sheriff, under the Absconding Debtor's Act, to recover rent due by virtue of a lease to the absconding debtor, the evidence given on the trial shewed an assignment of the reversion by the absconding debtor, and receipt of all, and half a year's more rent than was due thereon. The *bona fides* of the transaction between the absconding debtor and his assignee having been submitted to the jury, they found for the defendant in this suit. Upon motion for a new trial,

Held, that although as between parties themselves, litigating their own disputes, the court would, require a stronger case to disturb the verdict than was made out in this instance, yet here the plaintiff being a public officer, suing in the right of his office, and knowing nothing of the transactions between the defendant and absconding debtor, and the circumstances of the case appearing somewhat suspicious, a new trial was ordered on payment of costs.

This was an action brought by the plaintiff, as sheriff of the county of Ontario, under the provisions of the law respecting absconding debtors, to recover two half years' rent from the defendant, debtor to John Hicks, an absconding debtor, who had let certain mills for five years to the defendant, at \$700 a year, payable half yearly in advance, commencing from the 1st of March, 1862.

The defendant pleaded payment, and that before the rent became due Hicks had granted his reversion to one John Janson.

The questions arising at the trial were, the *bona fides* of the payment of the rent, and the conveyance of the reversion. The jury gave a verdict for the defendant.

In Michaelmas Term last, *M. C. Cameron*, Q. C., obtained a rule calling upon the defendant to shew cause on the first day of Hilary Term, why the verdict should not be set aside and a new trial had between the parties, the verdict being contrary to law and evidence, and on the ground of the discovery of fresh evidence, and on grounds disclosed in affidavits filed.

S. Richards, Q. C., in Easter Term, shewed cause. He contended that the plaintiff could have no claim for rent if Hicks had none, and he had assigned the reversion before the first payment of rent became due. He contended that the defendant had shewn that the rent was paid at all events, and

that the *bona fides* of the transactions had been fairly submitted to the jury, who had found in favour of the defendant. The affidavits filed disclosed nothing new, and did not warrant the granting a new trial.

M. C. Cameron, Q. C., in support of the rule, contended that the plaintiff's case was admitted by the pleadings, and that the defendant, to discharge himself, was bound to shew that he paid the rent, or that by reason of the assignment of the reversion by Hicks, that he was not liable to him or to his judgment debtor; that the defendant's case was suspicious on the face of it, and the facts disclosed in the affidavits filed tended to shew that what the defendant set up in reference to the payment of the rent was not correct.

JOHN WILSON, J.—In ordinary cases, as between parties themselves litigating their own disputes, where the *bona fides* of their transactions had been fairly submitted to a jury, we should perhaps have required a stronger case than the plaintiff has presented to us, to set aside the verdict and grant a new trial. Here the plaintiff is a public officer suing in right of his office, the claim of Hicks, an absconding debtor, with whose dealings he is totally ignorant. We cannot presume that he could be prepared to meet the evidence on the case which the defendant set up, for the knowledge of the dealings between Hicks and the defendant rested between themselves.

The case made by the defendant, as it appears in evidence, is suspicious. Hicks, on the 7th of December, 1861, leased mills to the defendant for five years, to commence on the 1st day of March, 1862, at \$700 a year, payable half yearly in advance, on the 1st day of March and September, in every year, the first payment to be made on the first of March, 1862. On the 11th of February, 1862, before any rent became due, he assigned the reversion to John Janson, who was entitled to the rent, if this be true, but the defendant, by his witness Ponson, proves that Hicks admitted the defendant paid him the first half year's rent. The second half year's rent was not due till the first day of September, and certainly not due to Hicks if Janson had the reversion, but the defendant, by the same witness, proves that on the 7th day of

July, Hicks was paid this second half year's rent by certain allowances and by a note. This payment is witnessed by an endorsement on the back of the lease in these words: "1862, July 7th, memorandum, that all rents payable under this lease have been fully paid and satisfied up to this date. Signed, W. Ponson, Agent." Now all that was due at that time was the first half year's rent, but this, Ponson says, was the second half year's rent, and he says it was made at the time in his office, in presence of the parties. The affidavits filed shew, that on Sunday evening the 6th of July, Hicks, accompanied by his son, absconded and has not been back to the neighbourhood since, the defendant's evidence is silent about Jan-son's claim in the meantime.

Under these circumstances, we shall grant a new trial on payment of costs.

Per cur.—Rule accordingly.

ANSLEY V. BREO ET AL.

Deed—Loss of—Secondary evidence of—Memorial—Executed by grantee—No evidence of deed.

Held, that before secondary evidence can be let in in reference to a deed supposed to have been lost, proof must first be adduced that such supposed deed *once* existed, and that it has been destroyed or lost, and diligent search made therefor; and on the authority of *Gough v. McBride*, 10 C. P. U. C., a memorial executed by the grantee held to be no evidence of the deed to which it was supposed to relate.

This was an action of ejectment tried before Mr. Justice *Adam Wilson*, at Kingston at the spring assizes in 1864. The plaintiff claimed the north west part, and the northerly fifteen acres of the east half of lot nineteen in the third concession of the township of Camden East, through Francis Lattimore, heir-at-law of Francis Lattimore, the grantee of Joseph Cornell, the grantee of the Crown.

The defendant Breo claimed the northerly fifteen acres of the lot by length of possession.

The defendant, Susan Clancey, claimed the north west part, as tenant at will of the heirs of her late husband who claimed by length of possession by themselves and those under whom they claimed.

At the trial there was conflicting evidence as to how long these defendants had possession, and as to what quantity of land they respectively possessed, over twenty years. The jury found a verdict for the defendants.

In Easter Term *Sir Henry Smith*, Q. C., for the plaintiff, obtained a rule calling upon the defendants to shew cause why the verdict should not be set aside and a new trial had between the parties, on the following grounds :

That the verdict is contrary to law and evidence and against the weight of evidence ; that there was no evidence that the grantee of the Crown, or the parties claiming under him had knowledge that the said defendants, or either of them, had actual possession of the premises defended for by them for the space of twenty years ; that the defendants or either of them had not such possession ; that there can be no constructive possession of unimproved land to constitute a bar to the entry of the legal owner into the residue ; and for misdirection in the learned judge telling the jury that the fact of the defendant Edward Breo having cut saw logs and timber on part of the premises defended for by him without the knowledge of the owner, must be taken as with the knowledge of the owner from the circumstance that the owner had found a party in possession of another portion of the premises sold for taxes in 1842, and that it must be assumed that the owner had knowledge and the jury might reasonably presume that the then owner had knowledge of the defendants' possession ; that the fact of Andrew Clancey, the husband of the defendant Susan Clancey, having had possession of a small piece of cleared land next adjacent to lot eighteen, but outside of his line fence, enclosed by itself, did give him possession of the other portion of the premises unimproved and in a state of nature, and the fact of a person taking actual possession of a part of a lot in a state of nature, without any title, gave him possession of the whole lot ; and for misdirection in this, that the learned judge should have told the jury that there was evidence that the said Andrew Clancey did not enter into or take possession of any portion of the said lot adversely, but on the contrary was caretaker for the then owner, the grantor of the plaintiff, and that the actual possession of the improved part did not draw to it the possession of the other part unimproved.

At the trial the learned judge allowed secondary evidence to be given of the deed from Cornell to the elder Lattimore ; the evidence respecting which was first that of Nancy N. Lattimore, who is the widow of Francis Lattimore, the plaintiff's grantor, and who said, "my husband was the eldest son of his father (Francis Lattimore) ; I have no papers belonging to my husband ; I have no deed from Cornell to Lattimore." Secondly that of Marshall P. Roblin, who said, "I am registrar of Lennox and Addington ; I registered the deed to Ansley ; I produce the memorial of a deed from Joseph Cornell to Francis Lattimore, dated the 13th of October, 1812, of the land in question, of the deed dated the 25th of April, 1809 ; I have heard of Allan McLean who was the first registrar of these counties ; the above memorial was proved before Allan McLean as registrar."

At the close of the case *O'Rielly* moved for a nonsuit because the production of the memorial, executed by grantee, is not sufficient evidence of the deed, which ought to have been produced or its absence accounted for. The learned judge held on the evidence of Mrs. Lattimore, above quoted, that secondary evidence of the deed might be let in, and the memorial, being over thirty years old, was received without proof as secondary evidence of the deed from Cornell to Lattimore.

During last term, *S. Richards*, Q. C., shewed cause, and contended, first, that the verdict ought not to be disturbed, for there ought to have been a nonsuit, because the deed was not accounted for, nor its existence shewn, to permit secondary evidence of it. That neither the elder nor younger Lattimore ever took possession of the land, under the deed, and that the memorial signed by the grantee is not alone secondary evidence of the deed. *Gough v. McBride*, 10 U. C. C. P. 166. Secondly, as to the grounds in the rule mentioned, he contended the evidence, although conflicting, was in favor of the defendants, and the charge of the learned judge was not objectionable. He cited *McLaren et al. v. Morphy*, 19 U. C. Q. B. 609.

Sir Henry Smith, Q. C., in support of the rule, contended

that the evidence shewed that possession had been taken by these defendants and those under whom they claimed, while the lot was in a state of nature, and did not run against the owner until he had actual knowledge of their possession. Con. Stat. Upper Canada, cap. 88, sec. 3. That the evidence is altogether uncertain, as to what each one had in actual possession, and there is no evidence of Lattimore's knowledge of Breo's possession, or that Clancey held adversely to him. He cited *Doe Beckett v. Nightingale*, 5 U. C. Q. B. 519; *Doe Macklem v. Turnbull*, 5 U. C. Q. B. 130; *Lake v. Rielly*, 5 U. C. Q. B. 136; *Doe Baldwin v. Stone*, 5 U. C. Q. B. 388; *Hunter v. Farr et al.* 23 U. C. Q. B. 324; *Doe Hill v. Gander*, 1 U. C. Q. B. 3; *Doe McDonell v. Rattray*, 7 U. C. Q. B. 321.

JOHN WILSON, J.—As the points as to whether there was any recognition of the title of Lattimore by Clancey, and how far there were words in his deed which would operate to pass his estate to the plaintiff, have not been noticed in the argument, we have not felt it necessary to consider them.

In the view we take of the evidence of the plaintiff, in regard to the proof of the deed from Cornell to Lattimore, it will be unnecessary to dispose of the matters mentioned in the rule.

If a deed be lost the party seeking to give secondary evidence of its contents, must give some evidence that it once existed, and then prove its destruction positively, or its loss, by proof that a search has been unsuccessfully made for it, in the place or places where it was most likely to be found. He is expected to shew that he has reasonably exhausted all the means of discovery, which the nature of the case would suggest. *Doe Padwick v. Wittcomb*, 6 Ex. 601, 5, 6; S. C. 4 H. of L. case, 431; *Taylor on Evidence*, 2 Ed. 369-70.

In the case before us there is no evidence that such a deed ever existed except what the memorial shews; there is no proof of its loss, no proof that it was searched for where it would have most probably been found. Possession had not gone with the deed, or it would naturally be in the plaintiff's possession. It would not probably be in the possession of Francis Lattimore

who conveyed to plaintiff, for although he sold as heir at law of Francis Lattimore the father, he did so because his brother Samuel, to whom his father had devised it, had neglected to register the will, which in general terms devised him all his real estate. The papers of the devisee were not searched, nor were those of the father, whose deed it was, if it ever existed. Samuel Campbell, the executor of Francis Lattimore the elder, was sworn as a witness, and produced the will, but he was not questioned as to this deed, or as to the papers of the testator. We think therefore, secondary evidence ought not to have been allowed of this deed, and that the memorial was not secondary evidence of it, under the circumstances of this case, as laid down in *Gough v. McBride* in this court. The plaintiff, we think, ought to have been nonsuited. This rule will therefore be discharged.

Per cur.—Rule discharged.

TURNBULL V. MCNAUGHT.

Trespass—Survey.

The declaration stated that the defendant broke and entered the east half of lot number twenty in the 6th concession of the township of South Dumfries, and there cut down and destroyed the trees and underwood to wit, &c.

The 4th plea alleged that as to the breaking and entering and cutting down and destroying a small quantity of underwood, he, the defendant, at the time when, &c., was in the lawful possession and seised in fee of a part of the west half of the same lot; that the boundary between the two parts was a straight line through the centre of the lot from the front to the rear; that the boundary was in dispute between the plaintiff and the defendant, and they could not agree upon the same, and that the defendant in order to discover and ascertain correctly the boundary, employed and instructed a duly authorised land surveyor to run the said line and establish the said boundary, who, with certain chain bearers and other necessary assistants, in pursuance of such instructions, and in discharge of their duty as such land surveyors, necessarily entered into and upon the land in the first part of the plea mentioned, for the purpose of running the said line and discovering and ascertaining the said boundary, and necessarily and unavoidably cut down and destroyed a small quantity of brush and underwood then growing upon the said land first mentioned, in order to run such line and to discover and ascertain such boundary as they lawfully might, doing no actual damage on the occasion, which are the same trespasses complained of.

Held, on demurrer to this plea, that a surveyor has no power to enter upon the lands of one neighbour for the purpose of making a mere private survey for another neighbour.

This was an action of trespass, *quære clausum fregit*,

on land known as the east half of lot twenty in the sixth concession of the township of South Dumfries, and cutting down and destroying the trees and underwood then standing and growing on the said land.

The defendant pleaded, 1st. Not guilty. 2nd. Not the close of the plaintiff. 3rd. Leave. 4th. Justification as to the entering, cutting down, prostrating and destroying a small quantity of underwood. That the defendant at the time when, was in the lawful possession of part of the west half of said lot, and was seised in fee thereof, and the plaintiff was in the lawful possession and occupation of a part of the easterly half of said lot; that the boundary between the said parcels of land is a straight line through the centre of the said lot from front to rear; that the boundary being in dispute between them, and they not being able to agree, the defendant, in order to discover and ascertain correctly the said boundary, employed and instructed certain duly authorised land surveyors to run the said line, and ascertain and establish the said boundary, who, with certain chain bearers and other necessary assistants, in pursuance of such intructions, and in discharge of their duty as such surveyors, necessarily entered into and upon the said lands in the first part of the plea mentioned for the purpose of running the said line and discovering and ascertaining the said boundary, and necessarily and unavoidably cut down, prostrated and destroyed a small quantity of brush and underwood, then growing and being upon the said land first mentioned, in order to run such line, and to discover and ascertain the said boundary as they lawfully might, doing no actual damage on the occasion.

To this plea the plaintiff demurred, assigning for cause that while the plea confessed a cause of action, it did not set out any facts which in law avoided the same.

Wood, for the plaintiff, cited the Consolidated Statutes of Canada, cap. 77, sec. 31 & 32, and contended that land surveyors engaged in the duties of their profession, might pass over the lands of any person doing no actual damage to the property of such person, but they were not justified in cutting brush and underwood, as justified by the plea.

O'Reilly, Q. C., for the defendant, cited the same act, and Dwaris, 691; Viner's Abr. Stat. 362; Plowd. 366; Shep Touch, 89; 11 Coke, 52 a, and contended that the plea set up no more than the act authorised, and that in performing a survey it was absolutely necessary to cut down brush and underwood.

JOHN WILSON, J.—It seems to have been taken for granted by the defendant that by the Con. Stat. of Canada, cap. 77, a surveyor was authorised to go upon the land of another, and there cut down brush and underwood for the purpose of running a line from one point to another dividing half lots. It has been argued by the defendant that the cutting of such brush and underwood was of necessity, without which the survey could not have been performed.

The point has not arisen, whether the entry upon any lands for the purpose of making a survey between the halves of a lot, not being a government line or side line, is authorised at all by the act, and it does not necessarily arise here. The plaintiff, as he presents the case to us, complains, not of the mere entry, but of the cutting his brush and underwood, as a matter of necessity in making this survey. Now we see no reason why the defendant, in making this survey, should have cut the defendant's brush and underwood. If it was necessary to see from one point to another in dividing this lot, the plaintiff might cut his own brush and underwood at any convenient distance from the line, and marked the division line by off-sets from the cleared line. We cannot imagine a case in which a survey of the kind set up in the plea could not be performed without entering upon, far less cutting down brush and underwood, as attempted to be justified by this plea. It would be a dangerous power that one man should, under colour of a survey, cause his neighbours brush and underwood to be cut down for the purpose of enabling, the survey to be most easily performed. If the statute authorised the entry upon the defendant's land at all for the purpose of dividing the lot, it was at the utmost the right to pass over it, doing no actual damage.

We think the plea bad, there will therefore be judgment for the plaintiff on the demurrer.

ADAM WILSON, J.—The question presented to the court is, whether a duly authorised land surveyor in running the boundary line between neighbours, upon the employment by one of them, has the power to enter upon the land of the other of them and to cut down “a small quantity of underwood,” when, as it is alleged, he had necessarily to enter upon the other’s land, and had necessarily to cut the underwood there in order to run the line, doing no actual damage?

The defendant was entitled to have the boundaries of his land defined by a surveyor under the statute. The survey so made would be one to be conducted with the ceremonies, and under the protection of the statute. The 32 section provides, that “any land surveyor, when engaged in the performance of the duties of his profession, may pass over, measure along, and ascertain the bearings of any township line, concession or range line, or other government line or side line, and for such purposes may pass over the lands of any person whomsoever, doing no actual damage to the property of such person.” I cannot say that under this section which authorises a surveyor to pass over the lands of any person for the purpose of measuring along and ascertaining the bearings of any government line or side line, this defendant was justified in entering on the plaintiff’s land and cutting his underwood, “in order to discover and ascertain correctly the boundary between the east and west halves of the lot, being a straight line through the centre of the lot from the front to the rear thereof.” A surveyor has no power to enter upon the lands of one neighbour in making a survey for another neighbour, but “for the purpose of ascertaining the bearings of a government line or side line,” he may enter upon this neighbour’s land if necessary.

This plea does not show the entry was made for such a purpose, but for the making of a mere private survey. It is supposed when the proper data and true bearings of the governing courses and lines are ascertained, that they can be readily applied to the private divisions or sub-divisions of lots between neighbours, without making an entry on the private lands of others in any way necessary, and probably this is so, and all therefore that the legislature had to provide for was the fullest license to traverse anywhere, doing

no actual damage in truly and correctly ascertaining the governing lines, courses and points.

In the absence of any clear provision that private property may be entered upon for the purpose of running a mere division line between neighbours, I do not feel at liberty to pronounce against this plaintiff's right of recovery for the acts complained of. In *Goodday v. Michell*, Cro. Eliz. 441, a "perambulation," it is said, may be supported by custom for all the parishioners to go over the plaintiff's land at a particular time, or over anybody's land. *Owen*, 71 S. C. In *Taylor v. Devey*, 7 Ad. & El. 409, a plea of perambulation was set up, but it was held to be badly pleaded because the right was asserted to pass through a house, without shewing that this was necessary for the purpose, or on the boundaries to be examined.

The plea in this case shews a deliberate entry on the plaintiff's land, and not by mistake of boundaries, and in the strictness in which the right is claimed it cannot, I think, be sustained.

Per cur.—Judgment for plaintiff on demurrer.

WINGATE V. ENNISKILLEN OIL REFINING COMPANY.

Trading corporation—Corporate seal—Executory contract.

A trading company entered into a written contract, but not under its corporate seal, for the purchase of a quantity of barrels.

Held, the contract being an executory one and not under seal (notwithstanding that the corporation was a trading one,) the defendants were not liable under the contract for refusing to accept barrels not then manufactured. Nor were they liable for damages for refusing to allow plaintiff to continue to manufacture barrels according to the agreement.

The writ in this cause was issued on the 9th of March, 1864.

The first count of the declaration stated that *before* the making of the agreement thereafter next mentioned, the defendants and one Wm. Wiley had duly entered into a contract whereby the defendants agreed to purchase from Wiley 2500 good barrels, to be made of thoroughly seasoned timber, and to pay for the same on delivery at the rate of \$2 25c. per barrel, and to take said barrels as fast as four men could

make them until defendants had used up what barrels they then had on hand, and thereafter in larger quantities as fast as Wiley could cause the same to be made; the barrels to be delivered in defendants' storehouse once every week, or as often as they might require them, and Wiley duly agreed to make and deliver the barrels accordingly at the price aforesaid, and afterwards Wiley entered upon the performance of the contract and in part executed the same, and after the making and delivery to defendants, of, to wit, 150 of the barrels according to the contract, Wiley, for a good consideration in that behalf, assigned and transferred to the plaintiff all his remaining interest in the contract and the right to make for the defendants the residue of the barrels at the price and on the terms thereby stipulated and provided for of which assignment the defendants had notice and assented and agreed thereto and thereupon, in consideration that the plaintiff, at the request of the defendants, with the concurrence of Wiley, duly agreed to complete the contract of the said Wiley with the defendants, and to make and deliver the residue of the said barrels according to the said contract, and to take and receive payment therefor at the rate aforesaid as follows, namely, a sufficient amount each week to pay the workmen and the balance in a reasonable time thereafter, (during which it was to remain in the hands of the defendants,) the defendants duly agreed to permit and allow the plaintiff to complete the said work, to wit, the residue of the barrels provided for by the said contract upon the terms aforesaid, and to purchase, take and receive the same from him accordingly, and the plaintiff did make a portion of the residue of the barrels and deliver the same to the defendants who accepted the same in accordance with the terms aforesaid, and laid out a large sum of money and incurred liabilities in providing materials and hiring workmen fully to complete the same, and has always been ready and willing to make and complete the whole of the residue of the barrels according to the said agreement, whereof the defendants always had notice. Yet the defendants, after having accepted and received from the plaintiff, subsequent to the said agreement with him, part of the said barrels so made and delivered as aforesaid, would not permit the plaintiff to proceed with

the said contract and manufacture and delivery of the residue of the said barrels thereby provided for, but wrongfully discharged and prevented the plaintiff from doing and completing the same, and refused to take or receive the same from the plaintiff, whereby the plaintiff lost the price of the barrels so made and delivered by him, and the profits which would otherwise have accrued to him from the completion and delivery of the residue, and has also lost a large sum of money laid out by him as aforesaid in providing for the completion thereof, and has sustained heavy damages by reason of the liabilities so incurred.

2nd count—For that the defendants, on the 24th of October, 1862, in consideration that plaintiff agreed to do certain works and furnish materials therefor for the defendants, to wit, to furnish good seasoned white oak staves, good quality hoop iron, pine or whitewood lumber, good quality, glue, paint, and all materials necessary for making first quality barrels or casks for refined oil, and to manufacture in a good and workmanlike manner fifty barrels per week of forty gallons each, or their equivalent in casks of eighty gallons each for the term of twelve months from the date of said agreement—to deliver them in defendants' storehouse once a week, or as often as might be necessary, at, and for the price of five cents per gallon for all the barrels to contain an average of 44 gallons each, and \$4 each for all casks to contain 80 gallons or upwards made from full length staves in stock for that purpose, to be paid in cash by the defendants to the plaintiff in full once a week, or as soon as delivered by the plaintiff. * * * The defendants duly agreed with plaintiff to permit him to do and complete the said works during the said year on the terms aforesaid, and to take and purchase from the plaintiff, at the rates aforesaid, at least 50 barrels per week of 40 gallons each, or their equivalent in casks of 80 gallons each, to be manufactured by the plaintiff during the term of one year from the date of said last mentioned agreement. And the plaintiff did accordingly commence, and in part perform the said last mentioned works on the terms aforesaid, and furnished all the materials and manufactured, to wit, 900 barrels of 40 gallons each of the quality

aforesaid, and delivered the same in the storehouse of the defendants in the quantities and in accordance with the terms of the agreement, to wit, eighteen weeks from the last mentioned agreement, and was always ready and willing to complete the whole of the said works during the remainder of the year, according to the terms of the agreement, and laid out large sums of money, and incurred heavy liabilities in providing materials and in hiring workmen fully to carry out and complete the said agreement, of all which the defendants have always had notice. Yet the defendants would not permit the plaintiff to proceed with or complete the performance of the said last mentioned agreement, and the manufacture and delivery of the barrels and casks for the defendants thereby stipulated for, but wrongfully refused to take or purchase from the plaintiff or allow him to deliver any more or further barrels, other than aforesaid, for eighteen weeks of the said year, as provided in the said last mentioned agreement, and thereby wrongfully discharged and prevented the plaintiff from completing and performing the same, whereby plaintiff lost not only the price of the said barrels and casks to be manufactured and delivered by him as aforesaid, and the profits which would otherwise have accrued to him from the completion of the said last mentioned agreement, but also a large sum laid out by him in providing materials for the completion thereof, and has sustained damage by reason of the said liabilities so incurred as last aforesaid.

Then followed the common counts for goods bargained and sold, goods sold and delivered, &c., and plaintiff claimed £1000.

1st plea to 1st count—Defendants did not agree with Wiley as alleged.

2nd plea—They did not agree with plaintiff as in that count alleged.

3rd. As to all the barrels in the first count alleged to have been delivered to defendants, payment by defendants to plaintiff.

4th. As to so much of the first count as alleged defendants would not permit plaintiff to proceed with the contract,

manufacture and delivery of the residue of the barrels, but wrongfully discharged and prevented plaintiff from doing and completing the same, defendants say they did not discharge or prevent the plaintiff.

5th. As to so much of first count as charges defendants with refusing to take or receive barrels from plaintiff, they say they did not refuse but accepted all the barrels which plaintiff delivered or offered to deliver.

6th. As to second count. They did not agree as therein alleged.

7th. As to all the barrels in the second count, same as third plea to first count.

8th. As to alleged breach of agreement in second count, they say they did not refuse to take or purchase from plaintiff any barrels made and delivered by plaintiff pursuant to his contract.

9th. To first and second counts—That after the making of the agreement in the counts mentioned, and before any breach thereof by defendants, it was mutually agreed between the parties that in consideration of defendants' agreeing to pay the plaintiff for 100 barrels then not completed, but which the plaintiff then promised to complete and deliver to defendants, and further agreeing that when they, the defendants, should require more barrels for use they should purchase them from the plaintiff on the terms of the agreement in the second count mentioned, which the plaintiff promised that when thereto required by the defendants, he would act upon and complete, and further agreeing that until they should so require the plaintiff to proceed they would not procure or purchase barrels from any person other than the plaintiff; he, the plaintiff, should waive the said agreements in the first and second counts mentioned, and discharge and release the defendants from further performance thereof, and the defendants then paid the plaintiff for the said 100 barrels, and agreed when they should require any more barrels for use they would purchase them from plaintiff on the terms of the agreement in the second count mentioned, and until they should require the plaintiff to act on that agreement they would not purchase barrels from any

other person, and the defendants have not yet required more barrels for use, and have not purchased barrels from any person other than the plaintiff.

10th plea to third count—Never indebted.

11th plea to third count—Payment.

The cause was taken down to trial before *Morrison, J.*, at the last fall assizes for the county of Lambton.

It appeared that the contract set out in the first count of the declaration had been entered into by Wiley with the defendants, and after some 81 barrels had been delivered on account of the contract, it was agreed by the defendants the plaintiff and Wiley, that plaintiff should deliver the remainder of the barrels to defendants on the same terms that Wiley was to deliver them, and that defendants should pay him therefor at the same rate they were to pay Wiley. It was further understood that Wiley was to be discharged from the further performance of that contract. Plaintiff, in fact, in addition to buying the materials he had on hand for making the barrels, paid Wiley some \$250 as part of the contemplated profits he would have made had he carried out this contract himself. It further appeared that after plaintiff had become interested in the Wiley contract, he had delivered defendants 753 barrels on account of it. This contract of Wiley, and the agreement under which plaintiff was substituted for Wiley, were parol, not even in writing. The contract set out in the second count of the declaration was in writing signed by plaintiff and by defendants. It was admitted there were still 1666 barrels to be delivered under Wiley's contract, and 1072 barrels under plaintiff's.

It further appeared that about the 10th of June, 1863, the president of the defendant's company notified plaintiff not to make any more barrels for them at that time under the contract, that they would not take them. He stated they had better pay damages for refusing promptly to carry out the contract than to pay for the barrels plaintiff might make them. The defendants contended and offered evidence quite strong enough to have warranted the jury in finding in favour of the defendants on the question, that plaintiff had agreed to waive the contract on defendants paying him for

100 barrels, and promising when they required more barrels they would take them from him at the contract price. They proved the payment of the money for the 100 barrels and their delivery to defendants.

The learned judge left it to the jury to say if there was a waiver of the contract as pleaded, and if they were satisfied of such waiver they were to find for defendants. If they found for plaintiff on the question of waiver, then they were to assess the damages as to each of the other contracts. As to the contract first set out in the declaration, they found the damages for the plaintiff \$560, and as to the other, \$340, making in all \$900:

At the end of the plaintiff's case leave was given to move to enter a nonsuit.

During Easter Term last *C. S. Patterson* moved to enter a nonsuit pursuant to leave reserved and on the grounds,

That no contract under the common seal of the defendants was shewn, and the action being brought on an executory contract the common seal of the defendants was essential to its validity; that the contract not having been executed as required by section 57 of chapter 63 of the Consolidated Statutes of Canada, was therefore not binding on the company, and that the contract declared on in the first count, as made by the defendants with one Wiley, was not assignable at law to the plaintiff, and was void under the Statute of Frauds.

Or why the verdict should not be reduced, pursuant to leave reserved, by deducting the amount of damages assessed upon either of the counts, in case the court should be of opinion that the plaintiff is not entitled to recover on such count.

Or why the verdict should not be set aside and a new trial had between the parties, on the ground that the verdict was contrary to law and evidence, no contract binding on the defendants having been proved, and the defendants plea of a substituted agreement having been proved.

During the term *C. Robinson*, Q. C., shewed cause, and contended that as to the agreement set out in the first count, it was a substantive agreement to perform the residue of

Wiley's contract, he having given it up and defendants having agreed with plaintiff to accept the barrels, he might deliver subsequent thereto and pay him therefor according to the terms of that contract; that the subsequent acceptance by the defendants from plaintiff of 753 barrels on account of and under the agreement he had so made with them was a part performance of that contract which took it out of the Statute of Frauds. He referred on this point to Chitty on Contracts, 5 ed. 71; Addison on Contracts, 181-2; Scott v. The Eastern Counties Railway Company, 12 M. & W. 38; Souch v. Strawbridge, 2 C. B. 808, 815.

That the contract set out in the second count of the declaration was a contract in writing, signed on behalf of defendants, and therefore not open to the objection just referred to, urged against the contracts in the first count. That as to the plea of waiver, the jury found for the plaintiff, and their finding would not be disturbed, particularly as it appeared there was no consideration for the alleged waiving of the contract, and from the facts shewn in evidence that the 100 barrels, for which the company were to pay, were in fact then made, and they were bound to pay for them at all events under the agreement. He referred to Addison on Contracts, 918-19, 1021-22; Moore v. Campbell, 10 Ex. 323. He contended the only point which could properly arise was the one so often raised and so much discussed both in this country and in England, whether a corporation could be sued for non-performance of executory contracts like these, the same not having been made under the seal of the company, or as to one of them not being signed by any trustee or officer of the company in any way to bind the company. He argued that holding that a trading corporation could contract by parol for anything within the scope of their authority would, to a certain extent, reconcile the conflicting decisions on this subject, and be more in accordance with the dicta of a majority of the judges who have expressed their opinions on the subject. He also contended that as to trading corporations there should be no distinctions between executory and executed contracts. He referred to Pim v. The Municipal Council of Ontario, 9 U. C. C. P. at p. 306; Church v. The Imperial Gas Light Company, 6 A. & E. 846;

Mayor of Ludlow v. Charlton, 6 M. & W. at p. 818 ; Whitehead v. Buffalo and Lake Huron Railway, 7 Grant, 357 ; Judgment of V. C. Spragge, at p. 380 ; S. C. in appeal, vol. 8, p. 157, at p. 189, 195, 204-5-6 and 215 ; Kingston Marine Railway Co. v. Phillips, Robinson & Harrison's Digest, 128 ; Hamilton v. Niagara Dock Company, 6 O. S. 381 ; Blue v. Toronto Gas and Water Co., 6 U. C. Q. B. 174 ; Sir J. B. Macaulay's judgment at p. 185, 188 ; Marshall v. School Trustees of Kitley, 4 U. C. C. P. 373 ; Stoneburgh v. Municipality of Brighton, 8 U. C. C. P. at p. 157 ; Great Western Railway v. Preston and Berlin Railway, 17 U. C. Q. B. at p. 485 ; Commercial Bank v. Great Western Railway, 22 U. C. Q. B. 256 ; Clark v. Hamilton Mechanics' Institute, 12 U. C. Q. B. 178 ; Bartlett v. Municipality of Amherstburgh, 14 U. C. Q. B. 152 ; Beverley v. The Lincoln Gas Light Co., 6 A. & E. 829, observations of Patteson, J., at p. 837-8 ; Lindley on Partnership, 846 ; Paine v. Strand Union, 8 Q. B. 340 ; Copper Mines Company v. Fox, 16 Q. B. 229 ; Lord Campbell's Judgment, p. 236 ; Henderson v. Australian Steam Navigation Company, 5 E. & B. 409 ; Reuter v. Electric Telegraph Company, 6 E. & B. 341 ; Lindley on Partnership, 210, 211 ; London Dock Company v. Sinnott, 8 E. & B. 347 ; Haigh v. North Bierley Union, E. B. & E. 873 ; Taylor on Evidence, 3 Ed. 802, 808 ; Prince of Wales Assurance Co. v. Harding, E. B. & E. 221 ; Bill v. Darrenth Valley Railway Co., 1 H. & N. 305 ; Ridley v. Plymouth Co., 2 Ex. 711 ; Smith v. Hull Glass Co., 8 C. B. 668 ; S. C. 11 C. B. 897.

He further urged there was nothing to shew that the company had a common seal ; that they ought to be considered as a mere co-partnership, consisting of only some five parties originally and now of probably but four persons ; that the rule applicable to corporations in the ordinary way ought not to extend to them, the amount of the capital being only some \$14,000, the larger portion of which was owned by a single person. It would seem absurd to have the business of a petty establishment like this hedged in by rules which were formerly applicable to corporations where large interests were affected, and where important rights might be sacrificed by the wickedness or folly of the managers. As

to the view to be taken of Con. Stat. Canada, cap. 63, sec. 36-37, he referred to the original statute 13 & 14 Vic., cap. 28, sec. 17, and to *Bank of Upper Canada v. Brough*, 2 U. C. Appeal Cases, 101, as shewing how the original act may be referred to as interpreting the Consolidated Statutes.

Patterson, contra, considered the most formidable objection to the plaintiff's recovery was the want of a seal to either contract. He considered that our Court of Appeals had decided that there was a broad distinction between executory and executed contracts, and whilst as to the latter an action would lie against a corporation on an agreement not under seal, they had in effect decided as to the former that it would not. He further contended that our Courts of Appeals had made no distinction between municipal and trading corporations, and referred to *Pim v. Municipal Council of Ontario*, and *Whitehead v. The Buffalo and Lake Huron Railway*. That the contracts now sought to be enforced, or certainly one of them, were not ordinary contracts for the purchase of barrels, but special agreements peculiar in their character, engaging the plaintiff to provide the materials of a certain description and make barrels which were from time to time to be delivered to defendants, who were to receive and pay for them from time to time, and the value of the articles to be so purchased was somewhat more than two-thirds of the whole capital stock of the company, and the agreements were of a character that might well have been reduced to writing and under the seal of the company. He referred to *East London Water Works Co. v. Bailey et al.* 4 Bing. 283; *Church v. The Imperial Gas Light Co.*, 6 A. & E. 846, Lord Denman's observations on the case last mentioned, and to *Garbutt v. Watson*, 5 B. & Ald. 613. He further contended that though a part-performance might be good to take a contract out of the Statute of Frauds, when the goods were to be manufactured when the agreement was made and when the acceptance took place if all were manufactured then the seller could recover for all, but if the buyer took and paid for all that were manufactured and then forbid the seller from manufacturing any more the latter could not recover damages for the breach of the contract as to the residue. He contended, at all events, there ought to

be a new trial as to the verdict on the plea of waiver, which was clearly against evidence and the finding on that was wrong.

C. Robinson, Q. C., for the plaintiff. The contract was to furnish materials of a particular kind, and to make barrels therefrom, and the contract being entered upon plaintiff had a right to recover for a breach of any part of it. Besides there was no sufficient legal consideration to bind the plaintiff, to the contract, all that defendants did was to agree to pay for the barrels that were manufactured, and that they were bound to do by the contract as it was when the alleged agreement to waive was entered into. He also referred to *Cort v. Ambergate, &c., Railway Co.*, 17 Q. B. 127; *Roscoe on Evidence*, 360.

RICHARDS, C. J.—When the case of *Pim v. Municipal Council of Ontario* was before the Court of Appeals, I had occasion to consider all the authorities up to that time. The language of the judges in some of the cases would go to the extent urged upon us by Mr. *Robinson* in his able argument in this case; that no matter whether the contracts entered into were executory or executed they might be entered into by parol by a trading corporation if the subject matter to which they related was within the course of business which the corporation by its charter was directed to carry on. But the weight of authority in the decided cases referred to in the judgment of the late Chancellor of Upper Canada in *Pim v. The Municipal Council of Ontario*, was in accordance with the views of the judges of the Court of Appeals, that to enforce an executed contract against a corporation it is not necessary that it should have been entered into by deed.

Since the decision in the Court of Appeals in *Pim v. The Municipal Council of Ontario*, there have been several cases in England in which the question under discussion has arisen, and the decided cases seem to tend more to this view than as to executory contracts the courts are unwilling to bind corporations by mere parol agreements.

In the *London Dock Company v. Sinnott*, 8 E. & B. 347, the Court of Queen's Bench refused to sustain an action

brought on a parol agreement between the company and the defendant, by which agreement the defendant had agreed to enter into a contract with the plaintiffs for scavenging their docks, and for the purchase of wood hoops, for a specified term. In the argument *Erle*, J., refers to the observations of Lord Wensleydale in the House of Lords in *Ernest v. Nicholls*, 6 of H. L. cases, 401, 418, where he is said to have dissented from the principle on which *Henderson v. Australian Steam Navigation Company*, and *Reuter v. Electric Telegraph Company* were decided. But Lord *Campbell* held that the observations of Lord Wensleydale, though entitled to great respect, were not binding on the court as the decision of the House of Lords on the point would have been. After taking time to consider, the court thought themselves at liberty to adhere to the doctrine in the previous cases decided in that court, but considered the contract not a mercantile one, not being with a customer of the company, and not of a character which created an impossibility that it should be under seal, on the contrary it was a contract which could be more conveniently under seal than by parol. But Lord *Campbell*, in that judgment, refers to the plaintiffs not bringing themselves within any of the exceptions to the general rule that a corporation aggregate can only be bound by contracts under the seal of the corporation.

In the *Prince of Wales Assurance Company v. Harding*, E. B. & E. 22, Lord *Campbell* again refers to *Ernest v. Nicholls*, and declines to be bound by extra judicial observations made in that case, though the case does not raise the point now under discussion it shews that the Court of Queen's Bench did not seem inclined to depart from their former views from anything said in *Early v. Nicholls*.

In *Haigh v. The North Bierley Union*, in E. B. & E. p. 882, the verdict for the plaintiff was supported on the express ground that the contract was an executed one, and in that view, on the authorities, could properly be sustained. *Erle*, J., distinguishes between the case of the *London Dock Company v. Sinnott* and the one then under discussion.

Crompton, J., in concurring in opinion with him, doubts if the case can be distinguished from the *London Dock Co. v.*

Sinnott. He added, "if the contract were, as had been contended, a contract from hour to hour, it might be impossible for the guardians to affix a seal; but if on the other hand the work was distinct and specified work done under three several resolutions, he should doubt very much whether the contract should not have been under seal, and leave was given to appeal." I am not aware however that the case was carried further.

There is also a *nisi prius* case of *Denton v. The East Anglian Railway*, 3 C. & K. 16, in which Lord *Campbell* held that the defendants were liable for paint furnished to them under an order from their secretary, though there was no contract under seal but it appeared the defendants' company had received and used the articles sued for.

Although the defendants' corporation has capital trifling in amount, and is composed of very few members, still the rule we lay down as applicable to it must be such as will equally apply to any other company to be formed under the same statute (Con. Stat. Canada, cap. 63,) and to other corporations of a like character. Corporations under this same statute may be formed having a capital of a hundred thousand pounds and thousands of stock holders, and the same consideration for their interests which the law exercises in relation to trading corporations generally, would seem to apply to the companies incorporated under this act. The money capital involved in their management, and the number of persons interested in their prosperity may be quite as great as in companies incorporated by special acts of the legislature.

When such companies have received the benefit of the labour of others, or are actually using and enjoying the property of others, or have money in their possession belonging to others, there are obvious reasons why they should be compelled to *pay* for that from which they have actually received a profit and advantage, or should be compelled to *repay* that which it is not equitable they should retain. But when they are sued on an executory contract where it may be difficult for the managers of the corporation to know what kind of arrangements their subordinates are making or may make, and where such arrangement incautiously made or

imperfectly understood may, in their results, sweep away a large portion of the property of the corporation, it would only seem just that a more rigid rule should apply, and that such contracts should be executed with greater formality, and should be under the seal of the corporation. With all the broad observations made by the judges as to the necessity of giving greater facility for entering into contracts by trading corporations, yet very few *mere executory* contracts have been enforced against them, and I scarcely recollect of one such contract in which a corporation contracting by parol, (unless expressly authorised so to do,) was able to recover damages for the non-performance of such a contract.

Looking at the decisions that have taken place in England since the judgment in *Pim v. The Corporation of Ontario*, and the views said to have been expressed on this subject by Lord Wensleydale, in the House of Lords, in the case of *Ernest v. Nicholls*, I am not prepared to hold that on an executory contract the plaintiff can maintain this action, the same not having been entered into under the seal of the company.

Notwithstanding the remark of Lord *Campbell* in *London Dock Company v. Sinnott*, as to the observations of Lord *Wensleydale*, made in the case referred to in the House of Lords, the judgment in that very case seems to have been put on a ground that would be more consistent with the views entertained by Lord *Wensleydale* than the previous decisions in the Court of Queen's Bench. The subsequent judgment in *Haigh v. The North Bierley Union*, in the same volume, does not advance an opinion beyond what was affirmed in our own Court of Appeals in *Pim v. The Municipal Council of Ontario*. Until some decided case entitled to more consideration than that in our own Court of Appeals goes to the extent of enforcing executory parol contracts against corporations of the nature of those sued on in this cause, I am not prepared to advance the law beyond what is there decided.

The contracts now sought to be enforced in reference to the amount involved, considering the capital of the company, were of the most important character; they were contracts that could have been conveniently made under seal, and are of

such a character that it would have been better for all parties that they should have been under seal. The doctrine that it was necessary for carrying on the business of the company that they should be constantly making contracts such as these does not apply in this case.

The rule to enter a nonsuit will be made absolute, and this renders it unnecessary to discuss the other questions raised in the argument. *Sutton v. The Spectacle Makers' Company*, decided on the 21st of May, 1864, 10 Law Times, N. S. Q. B. 411. *Blackburn, J.*, in giving judgment, said, "I think our judgment should be for the defendants on the ground that there was no retainer (of plaintiff, an attorney,) under the common seal of the defendants' corporation. A corporation cannot, as a general rule, bind itself to a contract except by its common seal. This case is not within any of the exceptions of that rule. The case of *Haigh v. North Bierley Union* goes further than any other on this point, but that is not applicable to the present case."

Per cur.—Rule absolute.

HOPE V. GRAVES.

Ejectment—County Court—Fi. fa. lands-attachment—Division court judgment.

Ejectment having been brought to recover the possession of premises sold and conveyed by the sheriff to the plaintiff under a writ of *venditioni exponas*, issued upon a county court judgment, based upon a division court judgment, recovered on proceedings commenced by attachment and summons issued the same day. The transcript of the judgment of the division court not however shewing that the proceedings were commenced by attachment,

Held, that the sale under the writ of *venditioni exponas* was void, by reason of the transcript of the judgment from the division court not having shewn that the proceedings in that court were commenced by attachment.

This was an action of ejectment to recover a piece of land containing forty-four square perches, lying at the intersection of Third street and Stuart's lane, in the city of Kingston, which the plaintiff claimed by virtue of a deed from the sheriff of the United Counties of Frontenac, Lennox and Addington, bearing date the 15th day of July, 1863. Defendant denied title of plaintiff, &c.

The case was tried at the last assizes held at Kingston before *A. Wilson, J.*

The plaintiff put in a transcript of the judgment of the first division court of the United Counties of Frontenac, Lennox and Addington, in which Isaac Hope, the now plaintiff, was plaintiff, and George Graves, the now defendant, was defendant, in these words :

“In the first Division Court of the United Counties of Frontenac, Lennox and Addington, between Isaac Hope, plaintiff, and George Graves, defendant, the following proceedings were had: On the 15th day of May, A.D. 1861, a summons requiring the defendant to answer the plaintiff's claim for debt amounting to forty-five dollars and — cents, was issued out of this court in this cause according to the statute in that behalf. On the 15th day of May, A.D. 1861, the said defendant was duly served with a copy of the said summons and of the particulars of the plaintiff's claim. At the sittings of the said court, holden on the third day of September, A.D. 1861, at the court house, Kingston, the said cause came on to be tried, and the following judgment was then and there rendered by the court: Judgment for the plaintiff for forty-five dollars debt and ten dollars and sixty-one cents costs of suit, to be paid forthwith. On the nineteenth day of September, A.D. 1861, a writ of execution upon the said judgment was duly issued out of the said court by the clerk thereof, which said writ of execution was directed to B. Fitzpatrick, a bailiff of the said court, and commanded him to levy the sum of fifty-five dollars and sixty-one cents of the goods and chattels of the said defendant. On the nineteenth day of October, 1861, the said bailiff returned the said writ of execution with a return thereto in the following words—
“No goods.”

Pursuant to the Upper Canada Division Court Act, I, Edwin Annesley Burrowes, clerk of the said Division Court, in the United Counties aforesaid, do certify and declare that the foregoing is a faithful transcript of the judgment and proceedings in the above cause, as shewn, and as appears by the original entries and records of the court.

Given under the seal of the said court, this 23rd day of November, 1861.

(Signed,) E. A. BURROWES,
Clerk.”

[L.S.]

This transcript was filed and entered in the county court of these united counties on the 26th of November, 1861, and on the same day a *fi. fa.* against goods for \$55 86 was issued upon it. This writ was returned and filed on the same day "no goods." On the same day an execution for \$55 86 was issued against lands returnable in twelve months. This was returned on the 27th of August, 1862—"I have levied of the lands and tenements of the within defendant to the amount of one shilling, which lands and tenements I have on hand for the want of buyers." On the 12th of February, 1863, a writ of *venditioni exponas* was issued, and on the same day given to the sheriff. On the 15th of July, 1863, the sheriff sold and conveyed the land in question to the plaintiff for one hundred and twenty-seven dollars, by virtue of the said writs.

Copies of the proceedings in the division court were put in, from which it appeared that on the 15th day of May, 1861, the suit had been commenced by an attachment which had issued on the affidavit of the plaintiff in the usual form; that on the said day the bailiff levied on a house and lot near Eagle Foundry, Kingston; that on the same day a summons was issued against the defendant, which, with the plaintiff's claim annexed, the bailiff swore "he served on the 15th day of May, 1861, by delivering a true copy of both, by nailing them to the door of the defendants last residence."

John Duff was sworn and said, he was clerk of this division court and had the office book in court, in which the judgments of the division court are entered. He finds the judgment of Isaac Hope against George Graves entered for \$45 debt and \$10 61 costs, in all \$55 61, on the 3rd day of September, 1861. The entry is in the handwriting of Mr. Burrowes his predecessor. The summons was returnable on the 28th day of May, 1861, but at this court it was adjourned to the July court, and from this court to the September court, when judgment was given. On the 19th September, 1861, an execution against goods was issued, and the bailiff returned it "no goods."

Sir Henry Smith, Q. C., moved for a nonsuit on the following grounds:

1st. That the transcript is not according to the statute for

the purpose of maintaining the proceedings which have been had under it.

2nd. That the writs issued under the transcript do not follow it. It sets out a judgment for \$55 61. The writs against goods and lands are for \$55 86.

3rd. The defendant's name in the entry on the book of the clerk of the county court is *George Grass*, instead of *George Graves*.

4th. The amount remaining due on the judgment is not entered in the clerk's book.

5th. That the transcript should have set out the attachment and the proceedings had upon it.

Richards, Q. C., for the plaintiff, answered.

1st. That the transcript recites the amount of the recovery in the court below correctly.

2nd. The writs differing from the transcript by twenty-five cents are not void, at most it is an irregularity.

3rd. The difference in the clerk's book is at most an irregularity.

4th. The amount due not being stated, it must be presumed all is due.

5th. The transcript is according to the forms as set out in the rules of the division courts.

The learned judge ruled—

1st. That the transcript was sufficient on its face.

2nd. That the executions issued upon it were not warranted by it.

3rd. That the transcript ought to have set out the proceedings by attachment.

4th. That it not appearing that any part of the judgment had been paid, it was not necessary to enter in the clerk's book what the amount is, remaining due.

The jury found a verdict for the plaintiff subject to the above objections.

It appeared that the original entry in the clerk's book had been *Grass*, corrected to *Graves*.

During last term *Sir Henry Smith*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved, on the above grounds taken at the trial.

Richards, Q. C., shewed cause. He contended, 1st. That the transcript was in form, according to the Division Court rules, made under the statute and sanctioned by the judges of the superior courts of common law, see rules, page 60, form 52. It sets forth all that the 142 section of the 22 Vic., cap. 19 requires. 2ndly. The variance between the amount of the judgment as mentioned in the transcript, and the amounts mentioned in the writs of *fi. fa.* against goods and lands, is at most an irregularity, and does not make the writs void. 1 Arch. Prac. 11 edn. 595; *Webber v. Hutchins*, 8 M. & W. 319; *King v. Birch*, 3 U. C. Q. B. 425; *Doe Elmsley v. McKenzie*, 9 U. C. Q. B. 559. 3rdly. That the entry in the clerk's book is directory; that however the name was entered, it appeared correctly at the trial. 4thly. That it is only where part is claimed that it is necessary to make an entry of what is remaining due. Lastly. That the attachment is a collateral proceeding, which it is not necessary should be stated as a proceeding, for by the transcript it appears the defendant was served with a summons.

Sir H. Smith, Q. C., in support of the rule, contended that the proceedings had not been set forth in the transcript in accordance with the 142 sec. By the transcript it was to be inferred that the defendant had been personally served with the copy of summons, but on inspection of the proceedings themselves the defendant had not been served. The transcript shewed a judgment as if obtained in the ordinary way; the proceedings that it was obtained under attachment proceedings. The transcript should agree in every particular with the original proceedings. The 77th section requires personal service where the amount claimed exceeds eight dollars. The variance in the mandatory part of the *fi. fa.* is fatal if it vary from the judgment, and the amount due ought to be entered in the book of the county clerk. Every thing should strictly conform with the requirements of the statute. He contended also that, the proceedings being between the same parties, the plaintiff was bound to shew that the original and all the proceedings had been properly conducted. He cited *McDale dem O'Connor et al. v. Defoe*, 15 U. C. Q. B. 386; *Jacomb v. Henry*, 13 U. C. C. P. 377; *Phillipson v. Mangles et al.*,

11 East 516, Readshaw v. Wood et al., 4 Taunt. 13 ; Farr v. Robins, 12 U. C. C. P. 37.

JOHN WILSON, J.—As division courts are not courts of record the legislature has not thought fit to allow them to issue writs against lands, but in order to enable judgment creditors to reach the lands of judgment debtors, it has provided a method by which its judgments may become judgments of county courts which are courts of record having the power to issue executions against lands. This court, in the recent cases of Farr v. Robins, and Jacomb v. Henry, has had under its consideration the mode by which judgments of division courts can be made judgments of record, and what is required to be brought from these courts to county courts to sustain writs of *fi. fa.* against lands and sales under them. A new question arises in this case. A principle of natural justice requires that he, against whom a judgment has been recovered, should have personal notice, or such other notice as the legislature has provided or the courts deemed reasonable notice of such proceedings as would, in the ordinary course, terminate in a judgment against him. The 77 section of the Upper Canada Division Court Act, except in cases commenced by attachment, requires personal service of every summons where the claim exceeds eight dollars. In cases commenced by attachment in that court the act has provided for the mode in which service has to be effected. Where an attachment has issued, and no summons previously served, and the defendant has not appeared, the same may be served either personally or by leaving a copy at the last place of abode, trade or dwelling of the defendant, with any person there dwelling, or by leaving the same at the dwelling if no person be found there. The transcript, on its face, appears all right, but “the proceedings in the cause” are not set forth as the 142 section requires. When the proceedings are examined we find an affidavit of the plaintiff which authorised the issuing of an attachment against the defendant. We find the attachment and the summons both issued on the same day. We find the summons and the claim of the plaintiff served “by nailing them to the door of the defendant’s last residence,” but it is

no where shewn that it was served by leaving a copy at the last place of abode, trade or dealing of the defendant with any person there dwelling, or by leaving the same at the dwelling and shewing that no person was found there. The summons required the defendant to appear and answer on the 28th of May, 1861. He did not appear, and it was adjourned to the July court. Again he did not appear, and it was adjourned to the September court. He did not then appear, and judgment was given against him.

The transcript ought to have shewn, at least, that the suit was commenced by attachment, and that the summons had been served so as to warrant the subsequent proceedings, but it shews none of them. On the contrary it shews that "the defendant was duly served with a copy of the summons," but he was not duly served. These are strong reasons why the transcript should shew that the proceedings were commenced by attachment, for there may have been goods or money in the clerk's hands applicable to the judgment. A defendant, against whom a judgment has been obtained by attachment, cannot be examined as to his effects under a judge's order, but under this transcript as it now stands the defendant might be subject to such examination by the judge of the county court, who would have no official knowledge that the proceedings in the inferior court were by attachment. In accordance with the opinions expressed in the two cases referred to, we do not think this transcript can be sustained to authorise its being made a judgment of the county court, on which the writs could be issued, by virtue of which the defendant's lands were sold. We think the plaintiff must be nonsuited.

Per cur.—Nonsuit accordingly.

MILLER V. THE BEAVER MUTUAL FIRE INSURANCE
ASSOCIATION.

Writ of execution—Renewal of—27 Vic., sec. 2, ch. 13.

Held, that the 2nd section of ch. 13, 27 Vic., is not retrospective in its operation, and under the authority of Neilson and Jarvis, decided in this court, all writs of execution more than once renewed previously to the 15th of October, 1863, the date of the said act, are void.

This was an action brought to recover \$500, on a policy of

insurance made by the defendants, dated the 21st of September, 1863, for loss by fire of plaintiff's dwelling house, situated on lots No. 27, 28 and 29, on Huron street, in the village of Thornbury.

The declaration was in the usual form, and contained the usual averments.

The defendants pleaded, first, that at the time the application was made for insurance and the policy issued to plaintiff, the premises were encumbered by a judgment for £85 5s., recovered in the Court of Queen's Bench for Upper Canada, in a suit of William Darling et al. against the plaintiff, which had been duly registered and on which a writ of *fi. fa.* against the lands of the plaintiff had been issued, and was then in the hands of the sheriff of the county of Grey, in which the said village is situated; but that the plaintiff did not state in his application that the said lands were encumbered, but on the contrary stated that they were not encumbered.

Secondly, they pleaded, that in the application for the policy the plaintiff falsely and fraudulently declared the value of the dwelling house and kitchen, mentioned in the application and policy, to be of the then cash value of \$750, exclusive of the land on which they were built, whereas in truth they were not of this value, but of a much less value as the plaintiff well knew.

The plaintiff took issue on both pleas, except the introductory averments in the first plea, which he admitted and which are not material to the present case.

The cause came on to be tried at the last assizes for the county of Grey before *Hagarty, J.*

It appeared in evidence that the above mentioned judgment had been first registered on the 14th of May, 1858, and re-registered on the 26th of April, 1861, for three years; that on this judgment a *fi. fa.* against the lands of the plaintiff had been placed in the sheriff's hands on the 5th day of August, 1861, which had been twice renewed, the last time on the 29th day of June, 1863. There was conflicting evidence as to the value of the dwelling house and kitchen.

The learned judge at the trial held the land to be encumbered, and told the jury that if the plaintiff did not state the encumbrance to the defendants the policy was void. The

plaintiff had leave to enter verdict for him on this issue subject to the opinion of the court on this ruling. The jury found for defendants on the first issue, and for plaintiff on the second, and assessed the plaintiff's damages at \$300.

In Easter Term last, *Macpherson* obtained a rule calling on defendants to shew cause why the verdict for defendants on the first issue should not be set aside, and a verdict for the plaintiff entered on that issue on the following grounds: 1st. That the *fi. fa.* against lands, in the first plea mentioned, was not at the date of plaintiff's application for insurance on the 18th of August, 1863, and at the date of the issuing of the policy on the 21st of September, 1863, in full force as alleged in the first plea, but on the contrary thereof was of no force or effect having expired on the 14th day of July, 1863. 2ndly. That the evidence did not prove that the lands were encumbered, as alleged in the defendants plea, at the time of the plaintiff's application for insurance, and of the issuing of the policy.

M. C. Cameron, Q.C., shewed cause and contended that the *fi. fa.* was in force, for the 27 Vic., cap. 13, sec. 2, is retrospective, so as to obviate the decision in *Neilson v. Jarvis*, 13 U. C. C. P. 176.

Creasor, in support of the rule, contended that the 27 Vic., cap. 13, sec. 2, was not intended to be retrospective, as was quite clear when the two sections of the act were compared. He contended that the writ expired on the 13th of July, 1863, for the first writ was issued on the 31st of July, 1861, renewed for one year on the 14th of July, 1862, and again on the 29th of June, 1863, but it really expired on the 13th of July, 1863.

JOHN WILSON, J.—The sole question in this case is, whether the execution of *Darling et al. v. Miller*, in the hands of the sheriff of the county of Grey, against the lands of the plaintiff, was a valid and existing writ on the 18th day of August, 1863, when the plaintiff applied for and obtained the policy on which this action was brought, so as to be an encumbrance on plaintiff's lands.

The 249 section of the Common Law Procedure Act was held, in the case of *Neilson v. Jarvis*, 13 U. C. C. P. 176, not

to authorize the renewal of writs of *fieri facias* oftener than once. This construction was put upon it, from the fact that the words "and so from time to time during the currency of the renewed writ," which occurred in sec. 21, relating to writs of summons, and in the English Common Law Procedure Act, relating to final process, had been omitted in the 249 sec. of our act.

In consequence of this decision, this section was amended by the 2 sec. of the 27 Vic., cap. 13, which enacted that sec. 249 should be amended by inserting after the word "expiration," in that section, the words "and so from time to time during the continuance of the renewed writ," and that such words shall be hereafter read and construed as constituting part of the act.

By the construction this court put upon the 249 sec. as it originally stood, the *fi. fa.* in the case before us was void, and if so the plaintiff's land was not encumbered by it; but the question is, whether we are to construe the 2 sec. of the 27 Vic., cap. 13, so as to give it a retrospective effect. The words themselves seem to preclude such a construction, for they are "shall be hereafter read." The first section of the same act has reference to an amendment of it in regard to the sale of lands, under execution against a mortgagor, and here, as in the second section, the words "his heirs, executors, administrators or assigns," are to be read after the word "mortgagor," where it occurs in the 257, 258 and 259 secs., but the phraseology is quite different, and would give more scope to argue that it was intended to apply retrospectively, for it is said whenever the word "mortgagor" occurs in the said sections, it shall be read and construed as if the words "his heirs, executors, administrators or assigns, or person having the equity of redemption" were inserted immediately after such "mortgagor."

Construing the words in the second section according to their literal meaning, and as different from the words in the first section, which it was argued was intended to be retrospective, though as to this we express no opinion, we think the second section has no retrospective operation, and therefore the *fi. fa.* of *Darling v. Miller et al.* in the hands of the

sheriff of Grey, on the 18th day of August, 1863, against the lands of the plaintiff, was not an encumbrance on his lands so as to make the insurance effected under plaintiff's policy void.

This case has not been broadly presented to us, as to whether this execution would have constituted an encumbrance within the meaning of the act under which this company was formed, and we offer no opinion on this point.

The rule will be drawn up to enter the verdict for plaintiff on the first issue.

Per cur.—Rule accordingly.

During this Term the following gentlemen were called to the Bar :—PETER CAMERON, ROBERT SWANTON APPELBE, HUGH McMAHON, WILLIAM PURVIS ROCHFORD STREET, GEORGE MARTIN RAE, DANIEL BLACK CHISHOLM, JOHN HENRY ANSLEY, AUSTIN COOPER CHADWICK, ALEXANDER FINKLE, PATRICK JOSEPH BUCKLEY, CHARLES WILLIAM PATERSON, JOHN DOUGLAS, THOMAS WELLS, THOMAS CLEGG, ABRAHAM WILLIAM LAUDER, SAMUEL SHAW LAZIER, JAMES HENRY SIMPSON, DAVID GLASS, JULIUS POUSSETT BUCKE.

TRINITY TERM, 27TH VICTORIA (1864).

Present:

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

GILCHRIST V. WELLER AND ARMOUR (EXRS.).

Con. Stat. U. C. chap. 38, sec. 9—Liability of executors of deceased surety for sheriff, under—Writ of revivor

In an action against executors of W., on a judgment obtained against F. as sheriff, and A. & W. as sureties for sheriff. Plea, that no *fi. fa.* issued, indorsed to levy of the goods of sheriff, in the first place, and in default to levy of goods of A. & W., as required by statute. On demurrer to plea, *Held*, That the statute is directory, and that if endorsement on writ not in accordance therewith, it may be set aside by court, but proceedings taken thereunder are not void:

That there is nothing in the statute preventing an action being brought on the judgment sued on.

Quære—Whether plaintiff, on a judgment recovered herein, would not be bound to endorse his writ to levy first of goods of sheriff, &c.

As to sufficiency of declaration: *Held*, that the judgment obtained against two or more was joint; that judgment recovered against two or more defendants does not render them joint contractors within *Con. Stat. U. C. ch. 78, sec. 6*; and that the action could not be maintained against the sureties as survivors, the plaintiff's remedy being by revivor or suggestion under *Con. Stat. U. C. c. 22, s. 312*.

The declaration stated that the plaintiff, on the 12th October, 1863, recovered, in the county court of the united counties of Northumberland and Durham, a judgment against J. B. Fortune, sheriff of the united counties, and one Robert Armour and W. Weller, the testator, jointly and severally, for the sum of £48 damages, and £11 12s. 5d. costs; and the plaintiff hath not obtained satisfaction thereof.

The defendants pleaded that the judgment mentioned was a recovery against Fortune as sheriff, and against Armour and Weller as sureties for Fortune as such sheriff, upon the covenant given by them under the statute in that behalf; and that

no writ of execution was issued, endorsed to levy the amount of the judgment so recovered upon the goods and chattels of Fortune as such sheriff, in the first place ; and in default of the goods and chattels of Fortune as such sheriff to satisfy the amount, then to levy the same, or the residue thereof, of the goods and chattels of Armour and Weller, his sureties, as required by the statute.

The plaintiff demurred to this plea, because it afforded no answer in law to the action.

J. D. Armour, for the demurrer, contended he was at liberty to sue upon the judgment, notwithstanding the Con. Stat. U. C. ch. 38 ; that the act only requires that the execution shall be first levied upon the property of the sheriff, not that it shall first issue against him.

No one appeared for the defendants.

ADAM WILSON, J.—Section 9 of the statute provides that “upon any writ of execution under a judgment rendered on such covenant, the plaintiff or his attorney shall, by an indorsement on the writ, direct the Coroner to levy the amount thereof upon the goods and chattels of the Sheriff in the first place ; and in default of goods and chattels of the Sheriff to satisfy the amount, then to levy the same or the residue thereof of the goods and chattels of the other defendants in such writ ; and so in like manner with any writ against the lands and tenements upon a judgment on any such covenant.”

This section is clearly directory, and may be enforced by the court ; or perhaps the process might be set aside, or more properly stayed until and unless the endorsement should be made to levy upon the sheriff's property in the first place ; but the process itself, or the proceedings taken under it, would not be void if no such indorsation were made, although it may be that any one damnified by its omission might have an action against the party causing the damage.

There can be no objection, that we can see, to this plaintiff suing on a judgment recovered against the sheriff and his sureties, more than upon any other judgment. It may be that by such a proceeding the sureties may be deprived of the benefit which the act intended they should have, of the writ

being first executed against the sheriff's property; but we do not see that this can be any objection to the plaintiff pursuing his ordinary right, so long as the statute has not taken it expressly away. If a defendant has been superseded in one case for not having been charged in execution within two terms, he may, in an action brought on this first judgment, be charged in execution upon the second judgment; for the plaintiff is entitled to every legal remedy on this second judgment (*Ismay v. Dewin*, 2 Bl. Rep. 982); and the court could not deprive the plaintiff of the benefit which the law entitled him to (*Blandford v. Foot*, Cowp. 72); the only question is, whether this bar (that the debtor had been superseded out of custody upon that judgment) set up by the defendants is known to the common law. If it be a bar at all, it is a bar to the whole demand; but any exception in favor of the defendant's person, can only arise in those cases where the legislature has expressly made it so.

In this last case, it was argued that as the defendant could not be taken directly in execution upon the judgment, it was unreasonable he should be made liable by circuitry; but this argument did not prevail.

It is said that the old lien of a judgment upon land is not lost by an action being brought on the judgment itself (*Erby v. Erby*, 1 Salk. 80).

We do not think that there is anything in the statute which prohibits an action being brought upon this judgment.

We do not say that even upon such a judgment the plaintiff would not be obliged to pursue the same course in his execution by endorsing it specially, according to the statute, to levy firstly upon the sheriff, in the like manner as he would have been compelled to act upon the original judgment itself. We rather think he would, and that he could not by such a proceeding deprive the sureties of the rights which they have by the statute.

This declaration, we think it right to say, is in a very unusual form, if the judgment be in truth the same as it is set forth, namely, a joint and several judgment against the three defendants. It is everywhere laid down that a judgment against two or more is joint only. *A sci. fa.* against

one of several judgment debtors, or separate *sci. fas.* against each, is bad (*Panton v. Hall*, 2 Salk. 598; 2 Saund. 72, b. and notes; *Cocks v. Brewer*, 11 M. & W. 51). The last case shews, if an action instead of a *sci. fa.* be brought on the judgment, the non-joinder of a defendant must be pleaded in abatement, as in ordinary cases of non-joinder, while it would be cause of demurrer if the process were by *sci. fa.* But a recognizance being a joint and several proceeding, the *sci. fa.* which issues upon it may be either joint or several, and the execution upon it may be several although the *sci. fa.* was joint, for "the judgment is not to *recover*, but to have execution *according to the recognizance*;" (Tidd's Pr. 9th ed. 1099, 1133;) and the force, form and effect of the recognizance "is several as well as joint." (*Sainsbury v. Pringle*, 10 B. & C. 751.) The members of joint stock companies are severally and not jointly affected by judgments recovered against their public registered officer, in such cases several *sci. fas.* may be issued on the same judgment against different members of the company; but this is by the authority of the provisions of the statute, made specially applicable to such a case (*Nunn v. Lomer*, 13 Jur. 236).

In the absence of any express authority to enter a joint and several judgment in this case, it cannot be that it could have been regularly recovered, if so recovered, or regularly entered if not so recovered, and if so entered in fact.

The provision which is made by statute to meet the case of the death of one of several defendants, is now contained in the 22nd chapter of the Consolidated Statutes for Upper Canada, section 312. That enactment is, "In case of the death of any one or more of the defendants in any action, against whom a joint judgment has been entered in any court of record, the plaintiff * * * * * may proceed by writ of revivor against the representatives of such defendant or defendants, or by an application to the court, as hereinbefore provided [that is, to enter a suggestion upon the roll, sec. 302], notwithstanding there may be another defendant still living, and against whom the judgment may be in force."

But the plaintiff, instead of following this plain course, which would still have kept his judgment in the same form

against all the parties interested as defendants, has brought his action apparently under what is commonly called the joint contracts clause, sec. 6, of the Consolidated Act. ch. 78.

I am not satisfied that a judgment recovered against two or more defendants render them joint contractors, obligors or partners, within the meaning of the statute; and if it do not, then the plaintiff must, if he can, maintain this action on common law principles.

But this I think he will have some difficulty in doing; for at common law, upon a judgment recovered against two, the charge, on the death of one, survived against the other as to the personalty, but not as to the realty; that is, execution against goods could only issue against the survivor, but execution against lands could, on the judgment being properly revived against the heir and terre-tenants of the deceased, be issued jointly against the survivor, and the representatives of the deceased (Tidd. 9th ed. 1120, 1121; Arch. Pr. 11th ed. 676, 1120; also 596, and the cases there cited; 2 Saund. 51 (4); Com. Dig. Pleader, 3 L. 3). In such a case, however, the plaintiff could take a *sci. fa.* against the survivor alone; but upon his judgment on such *sci. fa.* he could only take the goods of the survivor, and not his lands; for as to lands, the original judgment was a charge against all the defendants (*Edson v. Smart*, T. Ray. 26), and must therefore, as to lands, be executed rateably against all (*Harbert's case*, 3 Co. 12). There was no common law remedy for following the separate personal estate of a deceased judgment debtor by execution, *sci. fa.* or action on the judgment, because the liability continued against the survivor alone. The question whether there could be a joint and several judgment arose in the case of *Holcomb v. Hamilton*, 9 U. C. L. J. 235, on appeal, lately, when it was decided that a recovery against the different independent parties to a promissory note as maker and indorsers, was a several judgment. But this was a decision under the peculiar enactments of the statute for suing parties in a joint action, where there is in fact and in law a several liability.

As a general rule we can see innumerable difficulties as likely to arise if such a form of judgment as a joint and

several one is to be adopted. At one time a joint execution will issue against all three defendants: at another time three separate executions will issue, adding greatly and uselessly to the expense; at no time can the execution go against two of the three, for that would be neither a joint nor a several proceeding. Then again the plaintiff might have a *fi. fa.* against the goods of one, a *fi. fa.* against the lands of a second, and an action pending on the judgment against a third. And so also he may have three separate writs of revivor, or three separate actions upon the judgment, and in each case he would have to enter a separate judgment. And all to what purpose? To permit him to convert a judgment of the court into an actual contract of the parties, subject to all the remedies of the latter, while every possible advantage is already afforded to the creditor in every case which can arise, without subjecting the debtor to unnecessary, harrassing proceedings, and without improperly perplexing the rules and proceedings of the courts.

Judgment will therefore be, upon demurrer, for the defendants.

Per Cur.—Judgment for defendants.

NESBITT V. RICE.

Ejectment—Lost deeds—Secondary evidence of—When admissible.

Ejectment on sheriff's deed. To prove a deed from the sheriff the memorial was put in, it having been shewn by B. (a partner of W. D., the said W. D. having formerly been partner of J. D., then attorney for the plaintiffs), that the deed had come into the office of J. D. (J. D. not being called), and could not be found there on diligent search by B.

It being objected that the plaintiff's attorney to whose hands the sheriff's deed was traced, should have been called; also, that there was no evidence of there being any power of sale in the mortgage, by the exercise of which the deed produced purported to be executed.

Held, that objections not taken at the trial could not be considered when raised by rule.

That diligent search by B., who was partner with W. D., the former partner of J. D., with whom the deed had been left, the said B. having succeeded J. D. in the business, and having access to all his papers, and having seen the deed in his office lately, was sufficient search to admit of secondary evidence without calling J. D.

That the estate in the mortgage having become absolute at law in the mortgagee, there was no necessity for shewing that there was a power of sale in the mortgage to convey the legal estate.

Semble, that the recital in a deed proved is sufficient evidence of contents of a mortgage so far as therein recited.

Ejectment to recover twenty-five acres more or less of the north-west corner of lot No. 24, in 1st concession of Dereham, being the eighth of said lot 24, being six chains and thirty-nine links in front, and running in rear $39\frac{1}{2}$ chains.

The defendants appeared on the 16th October, 1863, and defended for the whole of the land.

The plaintiff claimed the land by virtue of a deed from the sheriff of Oxford to him, dated 29th September, 1863.

The defendants, besides denying the title to the land, claimed title in themselves : Elizabeth as being the owner by deed from George Sharp, who was the purchaser by deed from John Rice, who was the purchaser by deed from John Goodham, who was the purchaser by deed from the Canada Company, who were the grantees from the Crown ; and John claimed title as tenant under the late Joseph Quinn, who was the purchaser thereof from the Sheriff of the county of Oxford, who sold the same under an execution against one Joseph Pearl, who was the purchaser thereof by deed from Joseph Tripp, who was the purchaser thereof from George Sharp, who purchased by deed from John Rice, who purchased by deed from John Goodham, who purchased by deed from the Canada Company, who were the original purchasers from the Crown.

The cause was taken down to trial at the last Fall Assizes for the county of Oxford, held before Mr. Justice John Wilson.

The title to the following extent was admitted :—Grant to Canada Company, 24th April, 1833 ; deed from Canada Company to John Goodham, 3rd April, 1839 (registered 10th April, 1839) ; from Goodham and wife to John Rice, 12th April, 1845 (registered 6th May, 1845) ; the execution of deed from John Rice and wife to George Sharp, dated 29th November, 1850, was proven (registered 19th Nov., 1851).

The next step in the plaintiff's case was to prove a mortgage from Sharp to one McKenzie, and a transfer of it to one Tripp.

Tripp being called as a witness stated that he knew of a mortgage from Sharp to McKenzie, and an assignment of it affecting this lot, that they were given to Mr. Bennett, an

attorney at Ingersoll, for the purpose of making a deed under the power of sale. It was in 1853 he gave the mortgage and assignment to Mr. Bennett. He could not say he witnessed the mortgage.

John J. McKenzie stated that there was a mortgage on the land made to him in January, 1852, from Sharpe and his wife. He looked at a memorial of the mortgage signed by him on 8th January, 1852. He thought there was a power of sale in the mortgage, but could not be positive unless he saw it. He sold the mortgage to Moses Tripp. He did not remember executing the assignment, but his impression was he would not have sold nor Tripp bought it without an assignment.

Tripp was recalled, stated that he and his wife executed the deed of December, 1853, of the land to Joseph Pearl. He had no doubt there was a power of sale in the mortgage to McKenzie. He remembered the assignment. He heard Bennett read it. He did not remember all the covenants that were in it. It appeared all right, and he conveyed the place to Joseph Pearl. He did not remember anything in the assignment. He only remembered he had an assignment, and the assignment was properly executed. He was under the impression Bennett was the witness to it. He did not know who the witness was to the mortgage. He only remembered there was a mortgage and an assignment, but could not say what the contents were.

Exemplification of judgment in Common Pleas in suit, Nesbitt et al. v. Samuel Hillman and Joseph Pearl was put in. Judgment for £150 16s. 11d. damages and costs, entered 23rd November, 1858.

The sheriff produced a *fi. fa.* lands in above suit, tested 27th December, 1858, and renewed 19th December, 1859, he stated he sold the land under that *fi. fa.*

Elijah Whipple proved that he gave the deed from the sheriff to plaintiff to Wm. Daniell, the attorney for Nesbitt.

John Barry stated he was a partner of Mr. Daniell. He thought he had seen the deed in Mr. Daniell's office about a year and a half ago. He searched in Mr. Daniell's office for the deed, and also Mr. Nesbitt's papers and could not find it.

He had searched diligently and could not find it. The deed was left with James Daniell, who is now a county judge. He left his papers with Wm. Daniell, whose partner he (Barry) was.

Mr. *Ball* objected, that the Messrs. Daniell ought to be called before admitting secondary evidence of the deed. The secondary evidence was admitted, subject to the objection taken.

A copy of a memorial of the deed was then admitted and put in.

At the close of the plaintiff's case Mr. *Ball* objected, that the contents of the mortgage from Sharpe to McKenzie, and the assignment of it, did not sufficiently shew there was a power of sale in the mortgage which warranted the execution of the deed to Pearl.

The learned judge thought there was some evidence to go to the jury, and declined to withdraw the case from their consideration.

The jury found a verdict for the plaintiff.

In Easter Term last *Ross* obtained a rule *nisi* to set aside the verdict for misdirection in telling the jury there was evidence of a power of sale in the mortgage from Sharpe to McKenzie, and that there was sufficient evidence of the assignment of the said mortgage to Tripp, and on the ground of the reception of improper evidence of a secondary nature without laying a sufficient foundation therefor in this, that James Barry was allowed to testify to the loss of a deed from the sheriff of Oxford to the plaintiff, the original whereof had been traced to James Daniell's possession, and that no sufficient search was made for the mortgage from Sharpe to McKenzie, and that there was no sufficient evidence of any of the above deeds, and that the verdict is against law and evidence.

Anderson shewed cause and *D. B. Read*, Q. C., supported the rule.

RICHARDS, C. J.—As to the objections, that there was not sufficient evidence of search for the mortgage from Sharpe to McKenzie, and that there was no sufficient evidence of any

of the deeds, these do not appear to have been taken at the trial, and we cannot consider them now.

As to the sufficiency of the search for the deed from the sheriff to the plaintiff, the evidence, as I understand, is, that the deed was given to Mr. James Daniell, who was then plaintiff's attorney, that the present partner of Mr. William Daniell thinks he saw the deed amongst the papers in their office about a year and a half ago. That William Daniell was the law partner of James Daniell, and succeeded to his business on his being appointed county judge for the counties of Prescott and Russell, which counties are several hundred miles from where Mr. James Daniell formerly carried on his law business. There is no reason to suppose that Mr. James Daniell or Mr. William Daniell had any other custody of this deed than as the attorney of the plaintiff and in managing his business. Mr. Barry, the now partner in the business, living at Hamilton, where in their office the deed was seen about a year and a half since, states he made diligent search for it and could not find it, and searched amongst plaintiff's papers as well as in the papers in the office.

There is no reason to suppose the plaintiff had any object in keeping back the original deed from the sheriff, for he proved it by the memorial which set out a copy of the whole deed, and any objections to the deed itself would be as apparent from the copy proved as the original. The possession of the instrument by the Messrs. Daniell seems to arise from their management of plaintiff's business, and the present partner would be as likely to be able to find it if it had not been mislaid or lost as either of the others. I therefore think there was reasonable ground laid for admitting secondary evidence of the sheriff's deed.

As to the mortgage from Sharpe to McKenzie it does not appear that any objection was made at the trial, as to the sufficiency of the proof of the execution of this mortgage, the memorial was proved by Mr. McKenzie, the mortgagee, and was put in. The only objections urged both to the mortgage and the assignment of it at the trial, as far as I understand the grounds taken, were, that it did not appear there was sufficient evidence to show that there was a power of sale

in the mortgage which warranted the execution of the deed to Pearl.

Now suppose we look at the memorial of the mortgage produced and given in evidence, as I infer without objection, to prove the contents of the mortgage. That shows a mortgage in fee from Sharpe to McKenzie, subject to defeazance on payment of a certain sum of money by instalments, the last instalment was due on the 8th January, 1853. The conveyance from Tripp to Pearl was dated 31st December, 1853, after the estate had become absolute in law. At that time, if the mortgaged premises had been assigned to Tripp, there is no reason why he might not convey them to Pearl as he did. If the premises were mortgaged in fee to McKenzie, there was no power of sale required to transfer the legal estate to Tripp, nor from him to Pearl. There may have been some equitable interest left in the original mortgagor which would make it desirable to have a power of sale in the mortgage and to be able to exercise it. But as far as the legal rights of the parties are concerned, which we have to deal with, if the legal estate passed by the mortgage, the person holding that estate could undoubtedly convey it. The memorial shows clearly the legal estate passed to McKenzie, and from the evidence of McKenzie and Tripp there is no reason to doubt but that the whole of McKenzie's interest in the premises were assigned to Tripp.

It seems to me from the evidence referred to, the defendant's objection taken at the trial must fail.

When, however, we look at the full and ample recital of the mortgage to McKenzie, as well as of the assignment of it by him to Tripp, contained in Tripp's deed to Pearl, we see clearly that there was authority to exercise the power of sale as well as any other powers contained in the mortgage necessary for the transferring of the premises to Pearl. I am by no means certain that the recitals in this deed are not sufficient evidence of the contents of the mortgage to Mackenzie, and of his assignment of it to Tripp, after unobjectionable evidence had been given of the execution of these respective documents. When the contents of instruments are to be proved by secondary evidence, very slight evidence may sa-

tisfy a court and jury. A person who has merely read the instrument may prove its contents. That of course would not be so satisfactory as an examined copy taken by the person who saw it executed, but it is said there are no degrees of secondary evidence, and that the instrument may be proved by any secondary evidence. Tripp speaks of the contents of the mortgage and the assignment, but not in a very satisfactory way, he also speaks of giving the originals to Mr. Bennett from which to prepare the deed to be executed. He heard Bennett read it and it appeared all right. Without deciding that the recitals of the mortgage and assignment in the deed from Tripp to Pearl were sufficient evidence of the contents of those documents, though I am inclined to think that on consideration it will be found they are, I am not prepared to make the defendants rule absolute, for there seems to me to have been sufficient evidence to sustain the plaintiff's case against the objections taken at the trial.

•*Per Cur.*—Rule discharged.

BURN V. BLECHER.

Action on replevin bond—Damages occasioned by writ—Evidence—New trial.

An action by the assignee of a replevin bond for costs incurred in setting aside the writ, and for damages for detention of vessel replevied. Plea, non-damnificatus.

At the trial it appeared that the plaintiff had caused the vessel for which the writ of replevin had issued to be seized on certain *fi. fas.* placed in the sheriff's hands prior to her being replevied. The plaintiff wished to show that his object in seizing under the *fi. fas.* was to prevent defendant taking possession of her under the writ of replevin. This evidence was rejected. The plaintiff then accepted a nonsuit in deference to the judge's ruling.

On motion for new trial, for misdirection and rejection of evidence, *Held*, that the plaintiff, having taken a nonsuit out of deference to the judge's ruling, was not prevented from moving against it; that the plaintiff's property being seized under the writ of replevin, he had to take steps to defend the same, and was entitled to his costs of defence. What the other damages were, and whether they arose from the issuing of the writ of replevin, was for the jury.

Quære, whether those damages could be recovered on this bond.

Semble, that statement by an attorney of the reason of issuing *fi. fas.* was no evidence to enhance damages occasioned by the replevin.

Declaration on a bond of defendants, dated 9th April, 1863, to sheriff Fortune, in the sum of \$1,500; subject to a condition, that if Blecher did prosecute his suit with effect and without delay against the plaintiff for the unjustly detaining the schoo-

ner "Jane Ann Marsh," the property of the said Blecher, and if Blecher did pay such damages as the plaintiff should sustain by the issuing of the writ of replevin if Blecher failed to recover judgment in the suit, the bond should be void. Averment: that Blecher did not prosecute his said suit with effect against the said Burn; and although Blecher failed to recover judgment on the suit, which was determined against him by the writ being set aside by a judge's order duly made in that behalf, yet Blecher hath not paid the damages sustained by the plaintiff by the issuing of the said writ, which damages amount, to wit, to \$1000; whereby the bond became forfeited, and the sheriff duly assigned the bond to plaintiff, according to the statute.

The defendant pleaded, that since the making of the said deed, the plaintiff hath not been in any way damnified by reason or means of anything in the said deed or condition mentioned. On this plea issue was joined, and the cause taken down to trial at the assizes for the united counties of Northumberland and Durham, held before *Morrison, J.*, in the fall of 1863, when the plaintiff was nonsuited.

At the trial it was shown that on the 9th April, 1863, the schooner was replevied by Blecher. The plaintiff took steps to have her released from the seizure, and an application was made to a judge in chambers, which was enlarged from time to time. The writ of replevin was finally set aside on the 17th. The plaintiff went to Toronto, and remained some time, to attend to the matter, and his attorney went twice, and remained some days. His attorney charged for his services, and for telegraphs, &c., \$45. He thought the counsel who attended to the matter before the judge in chambers should charge much more. The plaintiff further proved that demurrage on the vessel was worth from \$35 to \$40 a day.

The defendant proved that there were writs in the sheriff's hands, which had been placed there in the month of March, against the present defendant, and against Marsh, under which, by direction of the attorney of Burn, the vessel was also seized on the 9th April, but from the evidence I infer after she had been taken under the writ of replevin. The

vessel was detained until the writ of replevin was set aside, and the sheriff received directions to withdraw from possession on the same day the replevin writ was set aside. The plaintiff's counsel wished to show that the object in seizing the vessel was to prevent the taking possession of her by the defendant, and therefore he was entitled to damages for her detention. On the other hand, the defendant contended that plaintiff was not entitled to any damage whatever, and that evidence could not be received as to what the intention was in seizing the vessel under the execution. The evidence was rejected, and the learned judge was of opinion, under all the evidence, that plaintiff should be nonsuited.

In Michaelmas term, *Hector Cameron* moved to set aside the nonsuit, on the ground of misdirection in ruling that plaintiff was not entitled to recover damages under the bond declared on, after the replevin writ had been set aside by a judge's order; and that the plaintiff could not show that the schooner mentioned in the declaration was detained under the writ of replevin, although she was seized under executions; and in refusing to leave it to the jury as a question of fact to say whether she was detained under the replevin writ; and the rejection of evidence to explain the seizure under the executions, and to show that she was not legally liable to seizure thereunder.

The rule was enlarged from time to time, until Trinity term last, when *J. H. Cameron*, Q. C., showed cause, and contended there were no grounds for bringing the action; that all the damages sustained were caused by the seizure under the writs of execution.

Hector Cameron contended it was a question of fact, whether the damages arose from the replevin of the defendant, or by the seizure under the executions. He referred to *Johnson v. McDonald*, 23 U. C. Q. B. 183; *Jackson v. Hanson*, 8 M. & W. 477.

RICHARDS, C. J.—I assume, from the way in which this case was argued, that the plaintiff's counsel took the nonsuit out of deference to the opinion of the learned judge, and that he is not now prevented from moving against it.

We are all of opinion that the nonsuit must be set aside. As the facts of the case are presented to us, the plaintiff's property was seized under this proceeding in replevin. He was therefore compelled to take steps to defend his property against that proceeding. He did so successfully, and we see no reason why he is not entitled to recover costs at least from the sureties in the replevin bond. If the sheriff had added to the bond taken the further provision suggested in section 5 of Provincial statute 23 Vic. ch. 45, viz., "and that the plaintiff do pay such damages as the defendant shall sustain by the issuing of the writ of replevin if the plaintiff fails to recover judgment on the suit," in that case there would be no doubt but that the plaintiff could recover his reasonable damages arising from the issuing of the replevin. What those damages are, and whether some of the damages claimed arose from the issuing of the replevin, is a matter of fact for a jury to determine; and whether those damages could be recovered under the present form of bond, we do not now decide. Nor do we decide that the reason why the vessel was seized under the *fi. fa.*, or writs of *fi. fa.* if more than one, was because defendant had replevied her, was admissible as evidence on the trial; on the contrary, we are inclined to think not. The fact that as soon as the writ of replevin was set aside, the executions were withdrawn, is always a circumstance to go to the jury; but we fail to see how the statement by an attorney that he directed the seizure of goods under a *fi. fa.* because they were replevied, can be evidence to go to a jury, to induce them to enhance damages in the present suit because of the subsequent seizure. If the plaintiff is entitled to damages, it is because of the seizure and detention under the writ of replevin, not under the executions.

On the whole, we think the nonsuit must be set aside, and a new trial ordered without costs.

Per cur.—Rule accordingly.

BOUCHER V. SHEWAN.

*Appeal from County Court—Trover for books—Anti-Christian works—
Pleading—New trial.*

An action of trover for pamphlets. Plea, not guilty.

On the production of one of the pamphlets sued for at the trial, the Judge directed that the plaintiff was not entitled to maintain the action for the pamphlets, because it was a scoffing and indecent attack on Christianity, and ordered a nonsuit. A new trial being refused in the court below, on appeal.

Held, that the defendant could not rely on the illegality of the publication under a plea of not guilty, but should have pleaded it specially.

That the plaintiff held property in the materials composing the pamphlets, independently of what was printed on them, and he would have a right to be indemnified therefor.

Semble, that there was a legal wrong, for which the plaintiff should have recovered something.

That the Judge below should direct the jury as to nature of works the law protects, and what it prohibits. If the pamphlets are not illegal he should also direct the jury to give damages for their value as a literary production. If the pamphlets are illegal, they should give damages to the value of the paper, &c., irrespective of the words upon the paper.

An appeal from the County Court of the United Counties of York and Peel.

This was an action of trover against the defendant, for converting to his own use the plaintiff's goods, that is to say, pamphlets.

The defendant pleaded not guilty, on which issue was joined.

At the trial, the following evidence was given:

Charles A. Backas said, he was a clerk in the defendant's store in 1859 or 1860, when the plaintiff came with two boys to the store, with some pamphlets, which the plaintiff wished to leave there until evening. They remained some time. Some were afterwards taken away by plaintiff. The balance were put in the cellar, and afterwards used for wrapping paper and lighting fires. They were destroyed. The defendant destroyed them because he did not think them of any value, and they were in the way.

On cross examination, he said the pamphlet produced is one of those that were left at the defendant's. There was a lecture to be given by Emerson that evening; they were left for gratuitous distribution to persons going to the lecture. The books were in the defendant's way.

John Brown said he distributed some pamphlets for the plaintiff, which were got from the defendant, about 120.

Would be about 420 still left. The defendant said, about two weeks after the books had been left, that he had destroyed them, and he thought he was justified in doing so.

Evidence was given to show that each pamphlet was worth from 15 to 25 cents.

Upon the production of the pamphlet, the plaintiff was nonsuited.

The plaintiff moved against the nonsuit, but the court discharged the rule because it was conceived the plaintiff was not entitled to maintain an action for the conversion of such a pamphlet, as it was a mere scoffing and indecent attack upon Christianity, and was not a fair discussion upon religious subjects. *Stockdale v. Onwhyn*, 2 C. & P. 163; 5 B. & C. 173; *Poplett v. Stockdale*, 2 C. & P. 198; *Fores v. Johnes*, 4 Esp. 97.

The plaintiff has appealed against this decision on the following grounds :

That the pamphlet is not libellous or illegal. That whether it is so or not is a mixed question of law and of fact, and cannot be determined without the decision of a jury; and the learned judge would not and did not allow the case to go to the jury. That the learned judge did not read the whole of the pamphlet on the trial. That there is no law against any kind of book or writing (leaving out treason and sedition), except such as are immoral or obscene, or have an immoral tendency, and libels on individuals. That though there be (such a law), there is no evidence in this book of its being one of the kind; there is no malice. That although the book be illegal, and the plaintiff not entitled to substantial damages, the plaintiff was entitled to nominal damages for the materials. That under the plea of not guilty the defence of illegality could not be set up; and that the plaintiff was entitled to a verdict for full damages, on the record and evidence.

There are two or three other grounds stated, which have no bearing upon the subject of appeal.

Last Trinity Term, the plaintiff in person referred to the cases already mentioned, and also to 4 Bl. Com. by Kerr, edn. of 1862, fol. 62; Mence's Law of Libel, 69; *Williams v. Bishop of Salisbury*; *Wilson v. Fendale*, 9 L. T. N. S.

787; Buckle's History of Civilization, *passim*; Du Bost v. Beresford, 2 Camp. 511; Gale v. Leckie, 2 Stark. N.P. 107.

H. Cameron contra. The pamphlet in question was clearly of the nature and character given to it by the learned judge in the court below. He referred to pp. 7, 9, 13, 15, 17, 19, 20, 21, 41, 42, 46 and 47 (and such a work is not within the protection of the law); the cases before quoted; and also Woolrych's Crim. Law, 1171; R. v. Eaton, mentioned in 3 B. & Ald. 162; Forbes v. Cochrane, 2 B. & C. 448.

The plaintiff did not object, in the court below, at the trial, that a special plea had not been pleaded, if it be necessary to have such a plea; and if he had so objected it would have been added, and the defendant would probably have succeeded on the special plea.

That in any state of the pleadings the plaintiff could not be entitled to more than nominal damages.

ADAM WILSON, J.—We think the illegality of the pamphlet, if it had been intended to have been relied upon as a defence, should have been pleaded. The present plea puts in issue the wrongful act of conversion alleged to have been committed by the defendant; and under it the defendant claims to set up either affirmative matter, or a justification of the conversion in consequence of the impropriety of the pamphlets, or a denial that the plaintiff can have any property whatever in pamphlets of such a nature.

In the former case there should have been a justification pleaded; in the latter case, admitting it to be true that the pamphlets are of the character represented, it may be that they cannot and ought not to be valued as of the value of pamphlets. But there can be no reason why the materials, or paper contained in what are called pamphlets, may not be held by the plaintiff as property, independently altogether of what is printed upon them.

If the plaintiff had had these pamphlets in his hand, the defendant could not have justified taking them away from him and destroying them, because they treated the Christian religion scoffingly. Nor could the defendant have justified taking them from the plaintiff's house and destroying them

for the like reason. The mere materials were the plaintiff's property at any rate, and to that extent he would be entitled to be indemnified.

The last case put is not unlike the case above cited from 2 Camp. 511, where it was held to be no justification for destroying a picture, which was publicly exhibited, that it was a libellous exhibition. Lord Ellenborough, C. J., ruled that even if it were so, the plaintiff was still entitled to the possession of the canvas and paint which composed the picture, and for which the jury found £5 damages in his favour.

That case differs in no respect from the present case, excepting that here the defendant held this property in his own possession, and converted it to his own use and profit by kindling his fires with it and using it, in his business for wrapping paper. But why should he have deprived the plaintiff of doing this with it, if he had desired to do so himself?

No doubt there was a legal wrong committed, for which perhaps some damages ought to have been awarded to the plaintiff.

There is a difference between such a case as the present, where the defendant destroys the plaintiff's materials, and a case where the plaintiff is seeking to recover for the price of materials furnished to the defendant, on which has been printed an immoral work, or for work and labour done in respect of such a work, as in the cases of 2 Stark, 107 ; 2 C. & P. 198 ; 4 Esp. 97 ; to which may be added Clay v. Yates, 1 H. & N. 73 ; which were all actions of contract.

But it may be that although a person who had delivered a quantity of libellous or immoral books to another under a special contract to furnish them, could not recover under the contract, he might still be entitled to get his materials back again ; and to maintain trover for them after a demand and refusal ; and to recover damages to the extent of the value of such materials, in the event of their non-delivery. And we think that such is the law.

As we think there has been a miscarriage of the cause, we are not called upon to pronounce any judicial opinion upon the written composition of the pamphlet ; as the case must go down to another jury, to whom should be submitted the

question whether the written work is of the character imputed to it or not, after a direction from the learned judge what kind of works the law protects, and what kind it prohibits, and therefore attaches no value to as works of artistical or literary value. If the jury find the publication not to be of such a nature as is contrary to the law, then they ought to award the plaintiff such damages as the goods, considered as pamphlets, were fairly worth at the time of the conversion. But if they find the publication to be of a nature contrary to law, under the direction of the judge, then to find for the plaintiff merely the value of the paper and worth of the goods, without regard to the words or value of the words upon the paper.

We have considered whether, as we are "to give such order or direction to the court below touching the judgment to be given in the matter as the law requires," we might not assume to determine whether the view of the learned judge was correct as to the character of this publication, and if so, whether, if we coincided with him, we should not direct that a verdict should be entered for the plaintiff with one shilling damages, as the court below possibly possessed the power to have made such an order. *Feize v. Thompson*, 1 Taunt. 121. But we think it better on the whole to remit the case to the court below, setting aside the nonsuit simply, and directing a new trial between the parties.

The defendant may then consider whether, as he cannot legally justify the act, it is worth his while to amend his pleadings, and whether his purpose will not be fully answered by trying the cause entirely on the quantum of damages, if the plaintiff can establish that he has sustained any damages deserving the consideration of the jury.

Per cur.—Appeal allowed.

ROE ET AL. V. McNEILL ET AL.

Ejectment on sheriff's deed—Improper recitals in—Purchaser not estopped by.

An action of ejectment on a sheriff's deed which recited "That by a *ven. ex.* I have seized as the lands of A. M. that certain tract, &c., and whereas the said premises since the seizure by me, made by virtue of the said writ of *ven. ex.*, after due notice were exposed to public sale," &c., and then granted to the purchaser.

It appeared that the lands had been seized under a writ of *fi. fa.* previously issued, and placed in the sheriff's hands, and that the *venditioni exponas* ordered him to expose to sale and sell the lands so seized.

Held, that the misrecitals of the acts of the sheriff in the deed did not invalidate the deed itself; that the purchaser was not nor were the plaintiffs estopped by such recitals, and therefore plaintiffs might shew what the facts were; that recitals did not exclude the presumption of a proper seizure on the *fi. fa.*

That as the debtor attorned to the purchaser the defendant could not impeach the purchaser's title so long as she retained the possession of the person making the attornment.

This decision is not inconsistent with that in the same case, reported in 13 U. C. C. P. 189.

Ejectment to recover possession of the west half of lot No. 22, in the 7th concession of the township of Fredericksburgh.

The claimants make title under a deed, from Wm. Forsyth Grant, to them of the 28th of October, 1862.

Jane McNeill alone appears and defends. Judgment by default is entered against the other defendants.

Jane McNeill, besides denying the plaintiffs' title, asserts title in herself under the last will and testament of the late Archibald McNeill, dated the 21st of May, 1846.

The cause was tried at Kingston at the Fall Assizes of 1863, before Kenneth McKenzie, Q. C., judge of the county court, when a verdict was rendered for the defendant, Jane McNeill, with leave to the plaintiffs to move to set it aside and to enter a verdict for them, if the court should be of opinion that the plaintiffs were entitled to recover upon the evidence.

The evidence was: Walker and others recovered a judgment in 1842 against Archibald McNeill in the Court of Queen's Bench; that a *fi. fa.* against goods was in the same year duly issued upon the judgment, and delivered to the sheriff for execution, returnable in February, 1843, and returned on the 10th of that month *nulla bona*.

That a *fi. fa.* against lands was on the same day, the 10th of February, 1843, sued out and delivered to the sheriff for

execution on the 13th of the month, upon which was returned a levy of the lands of the defendant to the amount of the writ, and that the sheriff still held the property for want of buyers. This writ was filed on the 12th of April, 1845. On the same day a *præcipe* for a writ of *venditioni exponas* was filed.

The sheriff of the then Midland District, who is still the sheriff of the united counties of Frontenac, and Lennox and Addington, stated that he was sheriff in 1843 and has been sheriff ever since then ; that he received a *venditioni exponas* in the cause of Walker and others v. McNeill, on the 22nd of April, 1845. That he seized the land in question in this cause under a *fi. fa.* between the same parties before this, and he sold the land on the 26th of July, 1845, to J. B. Forsyth, one of the plaintiffs in that writ, for £125. The deed from the sheriff to Forsyth was produced, it is dated the 28th of July, 1845. The sheriff also stated that he had searched for the *venditioni exponas* but could not find it ; that he had it in 1845 when he sold the land, and he thought he had seen it within the last two years ; that he advertized the land under the *fi. fa.* in the *Gazette*.

The deputy clerk of the Crown was called, who stated he had made a search in his office for the *venditioni exponas* but could not find it.

Thomas Downey was also called, he said Archibald McNeill died in 1848 or 1849 ; that he, the witness, was one of the executors under McNeill's will ; that McNeill lived on the land in question in 1845, and before that year, and also after it until his death ; that McNeill told the witness of this judgment of Walker's against him, and the amount of it ; he said he wished to attend the sheriff's sale of it ; the witness said he attended the sale ; the land was bought in by the parties who had the judgment ; he informed McNeill of it ; McNeill was well satisfied they had bought it in, and he afterwards told the witness that he was in possession under the purchasers.

The title was afterwards proved in the plaintiffs by the production of a conveyance from the sheriff's purchase, to W. F. Grant, and of a conveyance from him to the plaintiffs.

The defendant offered no evidence, but objected,

1st. That there was no legal proof of the writ of *venditioni exponas* having issued ; that a search should have been made for it in the principal office in Toronto.

2nd. That the sheriff's deed showed that he seized the land under the *venditioni exponas*, and did not recite a *fi. fa.*, and that no parol testimony could be given to explain or vary such a statement in the deed.

3rd. That the *ven. ex.* under which the sheriff has professed to seize the land is tested the 15th of February, 1845, and the sale under it was on the 26th of July of the same year, and that the twelve months required by the statute had not therefore elapsed between the delivery of the writ to the sheriff and the time of the sale.

4th. That the seizure of the land should have been under the *fi. fa.*, and could not have been made under the *ven. ex.*

5th. That the *fi. fa.* against lands being tested the 6th of February, 1843, and issued the 10th of that month, and not having been returned till the 12th of April, 1845, it had expired, and an alias writ should have been issued to re-seize the land before it could be legally sold.

6th. That the *venditioni exponas* could not be properly issued on an expired writ.

In Michaelmas Term last, *H. Cameron* moved for and obtained a rule upon the defendant to show cause why the verdict should not be set aside and a verdict be entered for the plaintiffs, pursuant to the leave reserved at the trial.

In Hilary Term *S. Richards*, Q. C., shewed cause. The plaintiff makes title under a sheriff's deed, made under the authority of the *venditioni exponas* already mentioned ; the writ was not produced at the trial, nor any exemplification or copy of it, nor was there any entry of it on the record ; and the recital of it in the sheriff's deed was the only evidence there was of what the writ contained. This writ then, directing the sheriff to seize the land as well as to sell it, was objectionable. Sugd. on Powers, 421.

Moss supported the rule ; he referred to the dates in the *Canada Gazette*, when the land was advertized under the *fi. fa.* in 1844, January the 11th, 18th, 25th, February 1st, 8th

and 15th, and under the *venditioni exponas* in 1845, May 22nd, 29th, June 5th, 12th, 19th, 26th and July 5th.

ADAM WILSON, J.—The sheriff's deed, which is in the ordinary printed form of a conveyance, made under the authority of a *fieri facias*, has the words *fieri facias* struck out and *venditioni exponas* written above them, it recites that by this writ the sheriff was commanded that of the lands and tenements of Archibald McNeill he should cause to be made the sum of, &c. It then proceeds, that by virtue of this writ "I have seized and taken, as the lands and tenements of Archibald McNeill, all that certain tract, &c. And whereas the said premises, since the seizure by me made by virtue of the said writ of *venditioni exponas*, after due notice, were exposed to public sale, &c." And then follows, in the usual form, the grant to the purchaser.

It does not appear from this deed that the *venditioni exponas* commanded the sheriff to seize the lands of the debtor, but only "to cause to be made" the sum in the writ mentioned. The sheriff says that by virtue of this writ he has *seized* the lands in question, as the property of the debtor. But is this to be assumed as the only seizure which was made of the land? and can that be assumed when we know that the writ of *venditioni exponas* gives no such power to the sheriff, but that it does authorize a sale to be made upon a previous seizure, which must have been returned as having been effected under a prior writ, specially commanding the sheriff to make a seizure?

This case was before the court in Easter Term, 1863, when the late Chief Justice, who gave the judgment of the court, expressed his opinion that the description of the writ in the deed as a *venditioni exponas* could not be rejected, and the description of it be read as of a *fieri facias*, because it would then appear the delivery was to the sheriff on the 15th of February, and that the sale was made under it on the 26th of July following, within the twelve months required by law to intervene between the delivery of a *fieri facias* to the sheriff and the sale; and that the *venditioni exponas* could not be assumed to contain what would support the sale, when

it had not been produced, and contrary to the express declaration by the sheriff of what it did contain.

A rule was therefore granted; but as I understand the case, the evidence was only such as the sheriff's deed itself furnished, without the *vivâ voce* evidence and the exemplifications which were produced at the last trial.

The sheriff, in referring to the writ, does not as before mentioned say he was commanded by it "to seize or levy on the lands" of the debtor, but that he was commanded "to cause to be made" the amount of the judgment; which is not inconsistent [although it is also the mandatory language of the *fieri facias*] with a making of the money by a sale only, and not by a seizure?

The writ, then, not being necessarily objectionable in itself, the whole irregularity or deficiency may be only in the sheriff's recital of his conduct under it. He says that by virtue of it he had seized and taken the lands of the debtor, but he does not say that by it he was directed to do so. He says also that by it, and also in consideration of the purchase money, he had sold the land to the purchaser, which is quite right; and he also says that the purchaser is to hold the land as fully as he the sheriff could or ought to sell the same by force of the statute and the *ven. ex.* or otherwise, which is also quite right.

The case then is, that while the sheriff does not recite his power inaccurately, he recites the exercise of that power untruly, for the seizure was not in fact made under that power, but under the prior writ of *fi. fa.* And the questions which present themselves are, whether, the exercise of the power to sell being represented as the exercise of a power to seize, renders the whole deed invalid, notwithstanding a proper seizure really had been made, and notwithstanding all the powers of the sheriff had been in truth fully and rightfully executed? or whether the seizure described to have been made under the *ven. ex.* excludes the presumption that a seizure had also been made under the *fi. fa.*, to authorize the issuing of a *ven. ex.*? or, thirdly, whether, if the whole deed be irregular and void, the acknowledgment made by the judgment debtor that after the sale he was in possession under the purchasers, did not estop him from disputing their title so long as he continued in

such possession, and does not in like manner estop the defendant, who is in possession under her husband's (the debtor's) will?

Looking at the writ, and the mode in which it was to have been acted upon, as in some respects like a power of a private nature to sell lands, we may be able to form a better opinion whether this deed can be supported in the face of the objections which have been raised against it.

In the execution of a power, it is said not to be necessary to make any reference in the instrument made under its authority to the power itself, if the act is one which can only be done by virtue of that authority, or if the property to be acted upon be so expressed as to make it manifest that the power was intended to have been exercised. Sugd. on Powers, 8th ed. ch. 7, sec. 7, 8.

The execution of a power will be supported, although the donee mistook his title and recited that he was seised in fee and conveyed as owner, while he had only a power. *Wade v. Paget*, referred to and commented on in Sugd. on Powers, 348; and see also *Trollope v. Linton*, 1 S. & S. 477. So the court will give effect to an appointment, where the donee intended to pass the property comprised in the power, although the donee did not profess to do so in exercise of the power. *Carver v. Richards*, 5 Jur. N. S. 1412, 6 Jur. N. S. 410. I think that such an instrument as this reciting the power and acting expressly under it, but misstating some acts alleged to have been done by its authority, would, notwithstanding the alleged misrecitals, if executed under a private power, be supported at law; and I see no reason why this instrument may not equally be supported when executed under a power conferred by law, and when in fact everything has been regularly performed under the power which was necessary to be performed to make it effectual. The deed, as before observed, authorizes the purchasers to hold as absolutely as the sheriff could or ought to grant, bargain and sell the land by force of the statute, and the *ven. ex.* or otherwise, which are very significant expressions, not altogether to be passed over. If the plaintiff can be estopped by these misrecitals, the parties may be driven to a court of equity to have the instrument

reformed; but if there be no estoppel as against them, they may show the truth as it is to support the deed at law.

In *Carpenter v. Buller* (8 M. & W. 212), Parke, B., says, "If a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital." In *Stroughill v. Buck* (14 Q. B. 781), it was recited in an indenture made between the plaintiff and the defendant, that the defendant had made certain advances to a third person, which were due and owing to him, and that the plaintiff should make certain further advances to such third person, and that the defendant should assign certain deeds to the plaintiff in security therefor; and it was held that the plaintiff was not estopped from denying that the money was not due and owing to the defendant at the time of the making of the indenture. Patteson, J., said, "When a recital is intended to be the statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument." *Young v. Raincock* (7 C. B. 310), is there referred to. See also *Wiles v. Woodward* (5 Exch. 557). This is the rule with respect to deeds inter partes; but the present case is that of a deed poll, in which the estoppel, to be of any effect, must be urged to prevail not only against the sheriff, whose deed it is, but against the purchaser also, whose title the plaintiffs now have.

The purchasers at the sheriff's sale could not know as a fact whether it was true or not that the sheriff had seized under the *ven. ex.*, although they must have known when they took the deed that he said he had so seized. They took the deed, believing the sheriff had the right to sell the land, and he had in truth such right. Why then should they be prevented from showing the truth, if they never bound themselves to the truth of the sheriff's declarations? and I think the cases before referred to show that they did not. The case

of *Edwards v. Brown* (3 Y. & J. Exch. 423, 1 Tyr. 197 S. C.) is an instance of a deed poll applicable to the rights of the purchasers; and the question of *Erle, J.*, to counsel, in *Stroughill v. Buck*, before cited, is also very appropriate. He asks, is there any case in which a recital by one party of a fact within his own knowledge, on the faith of which the other party contracted, has been held to estop the latter in favour of the former. Now if the purchasers be not estopped as between them and the sheriff, they cannot be held to be estopped by any other person.

I form the opinion therefore that the misrecital of the acts of the sheriff in this deed do not invalidate it; that the purchasers were not estopped, nor are the plaintiffs, by such recitals, and that they may therefore show what the facts and truth are.

I think also that the recitals do not exclude the presumption that, although a seizure may have been made under the *venditioni exponas*, a proper seizure may also have been made under the preceding *feri facias*; and further, that as the debtor did attorn to the purchaser after the sheriff's sale, the defendant cannot be allowed to impeach the purchasers' title so long as she retains and represents the possession of the person who made the attornment.

The opinion now expressed is quite in accordance with the judgment delivered in 13 U. C. C. P. 189; for the former case was founded wholly on the evidence which the deed itself furnished, while there is on this occasion the actual evidence of a *feri facias* against lands and of a seizure under it, and the actual truth is now shown with respect to the recitals contained in the deed.

We think the rule should be made absolute to enter a verdict for the plaintiffs.

Rule absolute accordingly.

IN THE MATTER OF THE JUDGE OF THE COUNTY COURT OF
THE COUNTY OF LAMBTON, IN A CAUSE IN THE FIRST
DIVISION COURT OF THAT COUNTY, OF KEMP V. OWEN.

*Action in Division Court for goods—Cause of action—When same arose—
Writ of prohibition.*

On an application for writ of prohibition on the ground that the cause of action did not arise within the jurisdiction of the judge of the county of Lambton,

Held, that where the defendant resided at G., at which place a bargain was made for the delivery of certain goods at W., and the bargain was fulfilled by such delivery and acceptance, that the cause of action arose partly at G. and partly at W., the judge of the County where W. is situate had no authority in respect of the cause of action.

S. Richards, Q. C., moved for and obtained a rule on the judge of the county court of the county of Lambton, and upon Kemp the plaintiff in the suit in question, calling upon them to show cause why a writ of prohibition should not be issued to prohibit the said judge from further proceeding in the said suit, on the ground that the said court had no jurisdiction in the said plaint or action to hear or determine the same; he referred to *Watt v. VanEvery*, 23 Q. B. U. C. 196. The facts are, the defendant resided at Goderich in the county of Huron; a verbal bargain was made at Goderich between the plaintiff and the defendant for the delivery by the plaintiff of a certain quantity of coal oil at a certain price to the defendant at Wyoming in the county of Lambton. Nothing appears as to the time and place of payment. The oil was delivered at Wyoming, and this action is for the price of it, or for the balance of it.

Harrison shewed cause. The bargain being verbal, there was no enforceable contract until the delivery and acceptance of the oil at Wyoming, and there also the money was payable for it, as nothing had been agreed upon as to the time or place of payment. *Aris v. Orchard*, 6 H. & N. 160.

The judge enquired into the particular objections which were raised at the trial before him, and upon the same facts which are now before the court he determined that the cause of action did arise within the county of Lambton, and therefore this court will not now retry a matter which has been already tried and decided upon in the court below; *Newcomb v. DeRoos*, 6 Jur. N. S. 68; many other authorities were

also cited, most of which are to be found in the decisions already mentioned.

S. Richards contra, referred to *Jackson v. Beaumont*, 11 Ex. 300, as shewing that the defendant not acquiescing in the judge's decision, but protesting against it, and the judge having no authority in fact, the defendant is not now precluded from this writ, which is one of right. *Wilde v. Sheridan*, 16 Jur. 426; *Bonsey v. Wordsworth*, 18 C. B. 325.

ADAM WILSON, J.—We think that the verbal bargain made at Goderich, effectuated by the delivery and acceptance of the goods at Wyoming, establishes very clearly, according to the authorities, that the cause of action did not arise, that is did not wholly arise at Wyoming, but partly at Goderich and partly at Wyoming, and therefore the judge of the county of Lambton, in which Wyoming is situated, had not and has not authority in respect of the cause of action; and as it appears the defendant resides at Goderich beyond the county of Lambton, so he has not authority to try the cause in respect of the defendant's residence.

The case in 6 H. & N. 160, does not apply here, for in this case the verbal contract made at Goderich was the contract acted upon and carried into effect at Wyoming, so that it would have been necessary on the trial to prove what it was that took place at Goderich, while in the case referred to the verbal bargain was abandoned and a new one was entered into when it came to be carried into effect by the addition of a new and important term to it. We think the rule must be made absolute.

Rule absolute.

McMAHON V. McFAUL.

Ejectment—Mortgage—Condition in—Right of entry.

The plaintiff in this cause brought an action of ejectment to recover possession of certain premises mortgaged to him by the defendant's father, the condition of which mortgage was broken.

Upon the trial it appeared that the plaintiff by a mortgage, dated the 1st of Oct., 1861, had conveyed the premises to one P. L. to secure him for endorsing certain promissory notes, the conditions of the mortgage being, that the said mortgage should be void upon payment of the said notes, and contained a recital that the notes might be renewed, but only three times or for a year, which the said P. L., the mortgagee consented to.

It appeared that the notes had been renewed from time to time, and longer than the period allowed by the proviso, and were afloat at the commencement of this suit.

The defendant objected that the condition of the mortgage was broken, and that the right of action was vested in P. L. the mortgagee.

A verdict having been taken for the plaintiff, with leave to the defendant to move to enter a nonsuit.

Upon motion *held*, that the notes not having been paid within the year, the condition of the mortgage was broken, a nonsuit was therefore ordered to be entered.

Ejectment. to recover possession of two acres of land described by metes and bounds, part of lot No. 3 in 1st concession of the township of Hillier, in the county of Prince Edward.

Plaintiff in his notice claimed the land by virtue of a mortgage made by Archibald McFaul, deceased, to him, dated 30th November, A.D. 1855, and by virtue of a decree of the Court of Chancery, dated 24th September, 1860, foreclosing the said Archibald McFaul from all right, title and equity of redemption in the mortgaged premises.

The defendant, besides denying plaintiff's title to the land, asserted possession by virtue of an agreement to purchase entered into between the plaintiff and the said Arch. McFaul, who died in possession of the premises, leaving the defendant in possession as his heir, and in part performance of a covenant therein contained, by which the said Arch. McFaul was entitled to possession thereof until default made in payment, and which payments had been duly made as agreed upon.

The cause was taken down to trial at the last Spring Assizes for the county of Prince Edward, before *Morrison, J.*

Plaintiff proved by a witness whom he called, that Arch. McFaul was in possession when he gave the mortgage to the plaintiff, and that he died in possession, and that defendant was his eldest son. He proved the execution of a mortgage in fee of the premises dated 30th November, 1855, from Arch. McFaul and wife to plaintiff, conditioned to be void on payment of £1000 and interest, by instalments, from 1st July, 1855, the last payment to be made on 1st July, 1859.

It also appeared that this land was on 1st Oct., 1861, mortgaged in fee by the above named plaintiff to Philip Low, Esq., to secure his indorsation on four promissory notes, which he did indorse and had renewed, and that the notes were then

under renewal. That since the death of Arch. McFaul the notes were renewed by his son, and the bank accepted Thos. McFaul as an indorser in place of the deceased. The amount of all the notes was then under renewal. Mr. Low had continued on renewing the paper, and it was then floating and not due.

The mortgage was put in at the trial; it recited that Low had been induced by obtaining the mortgage as a security to indorse at the instance and request of plaintiff, and for his accommodation, four promissory notes, dated the same day as the mortgage, viz., 25th October, 1861, each for the sum of \$1000, payable to the order of Archibald McFaul, and also indorsed by him, which notes were intended to be offered to the Bank of British North America for discount. It further recited in these words: "And whereas the said notes may be from time to time renewed in whole or in part every three months as they mature, which the said Philip Low consents to, but only for the space of one year, that is to say, for renewal three times; and whereas, it is upon condition, that in thus obtaining the name and security to the said Bank of the said Philip Low, he the said Philip Low is to be kept harmless and freed from the payment of said notes or of either of them or any part thereof, and from any loss, damage or costs on account of his said endorsing the renewals aforesaid." The instrument further recites, that in consideration of the premises and of 5s. paid by Low to McMahon "and for the better securing the payment in full of said notes and their renewals without recourse to the said Philip Low, and to save him harmless and free from all damages, costs and charges whatsoever in consequence thereof," McMahon granted to Low in fee the premises in question. Then followed the proviso: that those presents were "upon the express condition, that if the said promissory notes and their renewals in whole or in part, as the case may be, within one year from the date hereof, are duly retired and paid at maturity without default on the part of the said McMahon, without recourse by the said Bank to the said Philip Low, who is to be kept freed and fully indemnified and protected from payment of any part thereof, and from all costs and charges in respect there-

of, then the obligation and indenture by way of mortgage to be null and void, or else to be in full force and effect; and the said McMahon hereby covenants and agrees to pay the said notes and such renewals thereof at maturity, and to save the said Philip Low wholly freed and discharged from all liability thereon after maturity thereof; and it is hereby agreed that in case of default by the said McMahon in the payment of the said notes, or of any part or either of them, or their renewals as aforesaid, it shall and may be lawful for the said Philip Low, his heirs or assigns, to enter upon and occupy the said premises, and to foreclose the equity of redemption of the said McMahon in the said lands, or to sell the same at public auction, so as to secure and fully indemnify himself from all consequences and loss incurred by him, or which he might possibly incur and suffer in consequence of his liability to the said Bank by virtue of his having indorsed as aforesaid." The clause of redemise is as follows: "And lastly, it is hereby declared, and it is the meaning of these presents, that until default in the payment at maturity of said notes or their renewals, or of either of them, it shall and may be lawful for the said McMahon peaceably and quietly to possess and enjoy the said lands with all their appurtenances as aforesaid."

The defendant's counsel objected that the mortgage to Low was an outstanding one with condition broken, and that any title to recover was in Low. There were other questions raised at the trial not necessary to be considered as no reference is made to them in the rule. As to the question raised on the outstanding mortgage to Low the learned judge reserved leave to the defendant to move to enter a nonsuit. On the other points the jury found for the plaintiff.

In Easter Term last, *English* for the defendant moved, pursuant to leave reserved, to enter a nonsuit, on the ground that the plaintiff had conveyed away and parted with the title and right to possession of the premises in question in this cause, under and by virtue of an indenture of mortgage from him to Low, put in and proved at the trial.

The rule was enlarged to Trinity Term, when *C. S. Patterson* shewed cause. He contended that as the notes were

still afloat and renewed, if there had been a default in payment of any note, according to the terms of such note and mortgage, the right of entry on the part of Low was waived when such note was renewed. That the real object of the mortgage was to indemnify Low against loss or damage, and up to the time of bringing the action he had sustained no loss and no note was due, and therefore there was no breach of the covenant, or proviso or agreement in the mortgage. He referred to *Wheeler v. Montefiore*, 2 Q. B. 133. As to reading the whole instrument together to discover the intention of the parties he contended, that the effect of the last clause was to demise the premises to McMahon until default was made in the payment of some note which was not renewed, that the renewal either extended the time for, or waived any right which the mortgagee had to take possession. He stated that it was in some cases held, that instead of being a re-demise the agreement was in the nature of a mere covenant, and could not prevent the mortgagee from bringing ejectment, though he might be liable to the mortgagor for the breach of covenant for enjoyment until default. He contended, however, the time was sufficiently certain to create a term, and therefore plaintiff could properly recover under that demise. He cited *Wilkinson v. Hall*, 3 Bing. N. C. 508; *Ford v. Jones*, 12 U. C. C. P. 358; *Sidey v. Hardcastle*, 11 U. C. Q. B. 162; *Ashford v. McNaughton*, 11 U. C. Q. B. 171; *Konkle v. Maybee*, 23 U. C. Q. B. 274; *Copp v. Holmes*, 6 U. C. C. P. 373; *Say v. Smith*, Plowd, Vol. I. 271; *Penhorn v. Souster*, 8 Ex. 763; *Jolly v. Arbuthnot*, 4 DeG. & J. 224, S. C. 5 Jur. N. S. 689; *Fenn v. Bittleston*, 7 Ex. 152, at p. 158; *Ferguson v. Cornish*, 2 Burr. 1032; *Bolton v. Tomlin*, 5 A. & E. 856; *Wheeler v. Montefiore*, 2 Q. B. 140; *Doe Lyster v. Goldwin*, Ib. 144; *Doe Parsley v. Day*, Ib. 148; *Kendrick v. Lomax*, 2 C. & J. 405; *James v. Williams*, 13 M. & W. 828; Ib. 2 Ex. 798; *Ford v. Beech*, 11 Q. B. 852.

English contra. It appeared that McMahon did not pay the notes within the year, and therefore there was a default, and under the mortgage Low could have ejected the mortgagor. That consenting to renew the notes would be varying the terms of the mortgage by something not even in

writing, and this could not be done. That if the term of the redemise is not the year mentioned for the payment of the notes in the mortgage, then it cannot operate as a redemise at all, for it would be uncertain as to time, and could then only operate as a covenant between the parties to the deed. He referred to Cole on ejectment, p. 464.

RICHARDS, C. J.—I am of opinion that the rule to enter a nonsuit must be made absolute. The plaintiff's right to maintain the ejectment against the defendant is rested entirely on the ground that there was a redemise of the premises to him contained in the mortgage he made to Low. In my view of the law and the facts this redemise was only for one year, the time which it was understood the notes were to run and be renewed, it might have been determined sooner. I fail to see how the renewal of the notes after the expiration of the year could create a new term beyond that time, without something more being done in relation to it than appears to have taken place between plaintiff and Mr. Low, particularly as the plaintiff was not then, and, as far as we are informed, never has been in the actual possession of the premises. If the time was extended beyond the year, or a new term was created after that, when did it commence, and when does it end? Is there any certainty about it? None of the decided cases that I have met with go so far as to hold that the term is extended beyond the time mentioned in the redemise, unless there is a certain and defined mode of putting an end to it by a particular day, if the mortgagee so desires it, expressed in the mortgage itself. In some of the cases it is suggested there may be a tenancy at will by the terms of the mortgage created between the mortgagor and mortgagee, which will give the former the power of sub-letting or assigning, and if the mortgagor is not notified of it, it does not necessarily terminate the tenancy at will. As the plaintiff as well as Low never was in the actual possession of the premises, as far as we know, I do not see how a tenancy at will could be created between them so as to enable plaintiff to maintain this ejectment.

Per cur.—Rule absolute to enter a nonsuit.

DURAND V. THE CITY OF KINGSTON.

Con. Stat. U. C. cap. 89, secs. 2, 4 and 72—City separated from county for registration purposes—Registrar not bound to furnish copies of books, &c.

Where the registrar of the county of F., after the city of K. was separated from the county for registration purposes, furnished to the registrar for the city a statement of titles to land before separate books were kept for city.

Held, that the plaintiff was not bound to furnish the copies he had supplied and that the defendants are not obliged to pay for them, the case in question being a *casus omissus* from the act.

The declaration in this cause set out, that the plaintiff, before the issuing of a certain proclamation thereafter mentioned, was registrar for the county of Frontenac; that on the 1st of July, 1862, a proclamation was issued under the great seal setting apart a separate registry office for the city of Kingston, theretofore attached to and part of the county of Frontenac. That the plaintiff, as such registrar, delivered and furnished the registrar of the city of Kingston with a statement of titles to land within the said city before separate registry books were kept for the said city pursuant to statute, which statement contained 1500 folios, whereby the plaintiff was entitled to be paid the sum of \$350.

Plea, that plaintiff was not entitled to be paid by defendants, because by the said proclamation detaching the city of Kingston from the county of Frontenac, the city of Kingston was not attached to or made a part of another county for which a separate registry office was then kept.

To this plea the plaintiff demurred, alleging as the grounds of demurrer, that the plea was based on a wrong construction of the statute.

S. Richards, Q. C., for demurrer.

Read, Q. C., contra.

ADAM WILSON, J.—By ch. 89 of the Consol. Stat. of U. C., sec. 2, "Whenever a new county is formed there shall be a separate registry office established."

Sec. 3, "A city may be set apart and a registry office established in it."

Sec. 4, "The word county in the act shall include a city."

Sec. 72, "When any city, &c., making part of a county wherein a separate registry office is kept is detached from

such county *and attached to or made part of another county*, for which a registry office is also kept, the registrar of the county from which such localities are so detached shall deliver to the registrar of the county whereunto the same is newly attached, 1. That part of the registry book," &c.

Now the city of Kingston, although detached from the county, is not "attached to or made part of another county," and we fear the claim of the plaintiff cannot be supported.

There appears to have been no obligation upon the plaintiff to furnish the copies which he did furnish, and we think there was no obligation on the defendants to pay for them. The case in question is clearly a *casus omissus* from the act.

We cannot presume that the plaintiff was bound to furnish such copies by necessary implication; for that means, that although the meaning is not plainly expressed by words, it may nevertheless be plainly gathered by a reasonable construction of the context. *Young v. Hughes*, 5 Jur. N. S. 102.

We think the plaintiff could not have been prosecuted under the sec. 73 of the act for a misdemeanour, if he had refused to deliver the books, &c., which he was called upon to furnish and did furnish.

The language of a statute taken in its ordinary plain sense and not its policy or supposed intention, is the safer guide in construing its enactments. *Phillpott v. St. George's Hospital*, 6 H. L. Cases, 338; 3 Jur. N. S. s. c. 269.

In *Stratton v. Pettit*, 30 L. & E. Rep. 479, Maule, J., in speaking of a statute, speaks of it as "a notorious legislative blunder."

In *Lawton v. Hickman*, 9 Q. B. 590, Lord Denman, C. J., said, "A special provision to the effect of invalidating sales of shares before complete registration may have been omitted, through an oversight, or possibly from design. It is enough for a court of law to say that it is omitted." While, therefore, the legislature may be guilty of mistakes, or omissions, or blunders, as well as other bodies, or as well as private persons, we cannot speculate upon what we might suppose they ought to have done, or attempt to supply that which we see has not been done.

Per cur.—Judgment for defendants on demurrer.

HOGAN V. MORRISSY.

Judgment against executor—Action on—Plene administravit—Replication lands—Effect of.

Action on a judgment recovered against an executor. The declaration set out a judgment recovered; alleged the issuing of a *fi. fa.*, and a return of "*nulla bona*," and suggested a devastavit. Plea, that in the action on which this action is founded, the defendant pleaded *plene administravit*; that the plaintiff replied lands, on which judgment was given; that the lands were assets in the hands of the defendant as executor. The defendant then avers that the lands are sufficient, and that plaintiff has not proceeded against them.

Demurrer to pleas, on the ground that where a judgment has been recovered, and a devastavit is shown, it is not a sufficient reason to excuse the defendant from personal liability, that the plaintiff has obtained a judgment to recover of the lands of the testator.

Held, that the replication of lands is a full admission of the truth of the plea of *plene administravit*; that the plaintiff, by his replication in the former action, being estopped from setting up a devastavit now, the defendant is at liberty to show the true state of the case, to save himself from personal liability; that the replication (of lands) commonly used since *Gardiner v. Gardiner*, is both illogical and unnecessary.

This is an appeal from the judgment of the county court of the county of Carleton.

The action was brought on a judgment against an executor recovered by the plaintiff, on the 26th October, 1863, for £40, together with £23 6s. for costs; the sum of £40 to be made of the goods of the testator, at the time of his death, to be administered, if the defendant have so much thereof in his hands to be administered; and if not, then that the costs be levied of the proper goods of the defendant. The issuing of a *fi. fa.* is then alleged, in accordance with the judgment, and that the sheriff had made the costs of the proper goods of the defendant, and had returned that the defendant had no goods of the testator in his hands whereof he could make the damages. The plaintiff then suggests a devastavit, and that the defendant has become personally liable for the payment of the damages. The defendant has pleaded that in the action on which the judgment is founded, the defendant pleaded *plene administravit*, and that the plaintiff replied lands; on which judgment was given, that the lands were and still are assets in the hands of defendant as executor, and that they were sufficient to satisfy the plaintiff's claim. Then the defendant avers that the lands are sufficient, and that the plaintiff has never proceeded against them.

The plaintiff demurred to this plea, stating that the plea having admitted the judgment so recovered, as in the declaration set forth, and a devastavit of the goods has shown no sufficient reason to excuse the defendant from personal liability, merely because the plaintiff has obtained a judgment to recover of the lands of the testator.

Judgment was given for the plaintiff on the demurrer in the court below, and the defendant has appealed from the said judgment, and various causes of appeal have been assigned.

C. S. Patterson, for the appellant, referred to *Topping v. Yardington*, 6 C. P. U. C. 347; *Bowes v. Johnson*, 6 O. S. 158; *Mein v. Short*, 9 C. P. U. C. 244.

A. McNab, contra.

A. WILSON, J.—The ordinary judgment against an executor, except when he pleads a plea false to his own knowledge as a denial of his being executor, or a release to himself, is that the plaintiff recover the debt (or damages) and costs against the goods of the testator, if the executor have so much thereof in his hands; and if not, then that the plaintiff recover the costs of the proper goods of the defendant.

If, however, the executor plead *plene administravit*, and recover upon it, or if the plaintiff admit it to be true, the defendant is entitled to recover the costs of the action from the plaintiff. So if the executor plead this plea with another (as, never indebted), and go down to trial upon them, and recover upon this plea, and fail upon the plea of never indebted, he still recovers the general costs of the cause, but pays the costs of the issue on which he has failed, in the ordinary way, as other distributive costs are settled.

But if, in the last case put, the plaintiff does not deny, but confesses the plea of *plene administravit*, and takes the cause down to trial on the plea of never indebted, and succeeds, he recovers the general costs of the cause against the executor in the ordinary way, that is, that they be levied of the goods of the testator if the executor have so much, and if not, then of the proper goods of the executor. *Marshall v. Willder*, 9 B. & C. 655.

In this case, then, it may be, consistently with the judgment in the present case, that the plea of *plene administravit* may have been pleaded in the original action, and the costs only leviable against the executor's own goods, and that the executor is not liable in any manner for the debt itself. *Preston v. Peeke*, E. Bl. & El. 336.

If, then, this judgment be a proper judgment to have given, although the executor had pleaded he had fully administered, as well as the proper judgment to have given when no such plea was pleaded; if, in fact, the judgment is consistent with either state of facts, the defendant must be at liberty to show how the truth really is to save himself from liability, while yet not falsifying the record. If the defendant can show this, it must be a good answer to the action, because the plaintiff having confessed that the executor had fully administered, is estopped from setting up a *devastavit* now. 2 Wm. Ex. 5th ed. 1794.

The case of *Mein v. Short* shows, if it be necessary to establish it by a decision, that the replication of lands is as full an admission of the truth of the plea of *plene administravit*, as if the plaintiff had expressly confessed its truth and prayed judgment of assets *quando*; and we think the very lucid and convincing judgment of the then Chief Justice of this court should receive the attention of pleaders in cases in which the goods have been exhausted, and the remedy is desired to be pursued against the lands. The replication of lands, which has been so long in use, and which was thought to be necessary to carry out the anomalous decision in *Gardner v. Gardner*, seems certainly to be both unnecessary and illogical.

We think judgment below should be reversed, and judgment in the court below be ordered to be entered for the defendant on the demurrer.

Appeal allowed.

ROBERTSON V. FORTUNE ET AL.

Action against sheriff and sureties—Demurrer to declaration—Allegation of judgment recovered.

The declaration set forth the statutory covenant of sheriff and sureties, and alleged that plaintiff caused a writ of *hab. fac. seis.* and *fi. fa.* to be placed in sheriff's hands, under which he had levied \$151, which he had not paid over. Demurrer by sureties, on ground that no judgment was alleged to have been recovered to warrant the issuing of the *fi. fa.*, and because it is not alleged that the sheriff received the money while the covenant was in force.

Held, that the declaration was bad, in not alleging the recovery of any judgment to warrant the issuing of the *fi. fa.*

That there being nothing to shew the covenant sued on was qualified as to time, in the absence of such an allegation, the presumption is for the continuance of liability.

The declaration, which is dated the 29th of March, 1864, after setting out the statutory covenant into which the sheriff and the other two defendants, as his sureties, entered, which is dated the 12th of September, 1860, states, that on the 9th of January, 1864, the plaintiff caused to be delivered to the sheriff a writ of *Habere facias seisinam* and *Fieri facias*, issued out of the Queen's Bench, wherein the now plaintiff was demandant and one Jonathan D. Noran was tenant, directed to the sheriff, by which writ the sheriff was commanded, &c., as in the usual form in such cases; that the sheriff levied the whole sum which he was directed to levy to the amount of \$151.24, and that the sheriff had not the monies he was so directed to make before the justices of the court according to the exigency of the writ, nor had he paid the same to the plaintiff; by means whereof the plaintiff was injured.

The two sureties demur separately to the declaration, because there is no allegation made of the recovery of any judgment by the plaintiff to warrant the issuing of the *fieri facias*, and because it is not alleged that the sheriff received the money while the covenant declared on was in force.

The plaintiff has joined in demurrer.

In last Easter Term, *S. Richards*, Q. C., for defendant Covert, referred to *Bidwell v. McLean*, 5 O. S. 690.

Burns for defendant Frazer, referred, on the first ground of demurrer, to *Sanderson v. Hamilton*, 1 Q. B. U. C. 460; *Shattoch v. Carden*, 6 Exch. 725; *Warmoll v. Young*, 5 B.

& C. 660; *Evans v. Manero*, 7 M. & W. 463; and on the second ground to *Summers v. Hamilton*, 6 O. S. 113; *McMartin v. Graham*, 2 Q. B. U. C. 365.

J. Boyd for the plaintiff, on the first ground, referred to *Bradbury v. Adams*, 1 Q. B. U. C. 538; *McIntosh v. Jarvis*, 8 Q. B. U. C. 530; *Arch. Pr.*, 9 Edn. 625; *Coml. Bank v. Jarvis*, 6 O. S. 474; *Roscoe's N. P.*, 10 Edn. 829; *Shuter v. Graham*, 2 Q. B. U. C. 164; *Kent v. Mercer*, 12 C. P. U. C. 30; *McMartin v. Graham*, 2 Q. B. U. C. 365; *Atkin v. Moody*, 13 Q. B. U. C. 173; *Upper v. Hamilton*, 1 Q. B. U. C. 467.

[The court referred to 1 Saund. 37.]

As to the second point, he contended, that as the covenant is by the statute to remain in force for four years, the date of the covenant, and the date when the writ was delivered to the sheriff, and the date of the declaration, showed that the default of the sheriff had happened within the four years from the date of the covenant, during all which time, in the absence of any averment to the contrary, it must be presumed the covenant remained in force; *McCrae v. Hamilton*, 6 O. S. 159; and that there was nothing to prevent the covenant being either for a time unlimited or for a specific period beyond the term of four years. *Thompson v. McLean*, 17 Q. B. U. C. 495; *Hutchinson v. Baby*, 2 Pr. Rep. U. C. 127.

ADAM WILSON, J.—In all the precedents the judgment on which the writ of execution is founded is stated in the declaration, as showing the title of the plaintiff to maintain his action against the sheriff. In 1 Saund. 37, the judgment was arrested because it was not stated. In *Eden v. Lloyd*, Cro. El. 877, it was held not to be necessary to state the whole record, but it must be alleged that the plaintiff had recovered a judgment. In *Brazier v. Jones*, 8 B. & C. 124, Lord Tenterden, C. J., said, "When you declare against the marshall for an escape out of execution you always state the judgment."

Bayley, J., said, "In an action for an escape the plaintiff must aver and show in evidence, not only the escape of the prisoner, but that he was previously lawfully detained; here nothing analogous to a judgment is alleged."

In this last case it was held, that to charge the marshal for the escape of a prisoner taken on an attachment for non-payment of an award, it was necessary to set out the rule of court on which the attachment was founded.

In *Bidwell v. McLean*, 5 O. S. 690, such a form of declaration as the present was held bad on general demurrer. We think these authorities are quite conclusive that the ground of demurrer must prevail. It is quite clear that the plaintiff has no right to take the debtor's goods unless he has a judgment. It is the judgment which is his claim against the debtor, it would be the judgment he would sue upon if he were to bring an action for his judgment debt, it would be the judgment he would revive by writ of revivor. The execution is merely process to enforce payment of the debt, and it is the justification for the sheriff for his act of seizure under it. No doubt the sheriff can justify himself against the debtor whether there be a judgment or not, but it is quite a different case whether the execution creditor can make the sheriff liable when there is no judgment, and this appears to be the plaintiff's conduct and proceeding in this suit; for if no judgment be alleged we cannot assume there is one, and on the trial of such a declaration no judgment would have to be proved.

On the other point we think it does sufficiently appear that the remedy has been rightly prosecuted against the sureties upon their covenant. The dates may be taken to be sufficiently certain to shew that the whole of the facts complained of occurred within the four years, if the covenant were only for that time, which however may not be the case; and we have nothing to shew us that the covenant is qualified as to time at all, and in the absence of such allegation the presumption would rather be for the continuance of things as they are than the contrary. If the covenant has been determined before the usual period, it is a fact which was more properly within the knowledge of the sureties and should have been pleaded by them.

We think there should be judgment for the sureties on demurrer.

Per cur.—Judgment for sureties on demurrer.

JOWETT V. HAACKE ET AL.

*Trespass—Right to bring same when plaintiff not in actual possession—Damages
—When new trial to review will not be granted.*

Trespass to land. Pleas, not guilty, and that the premises were not the plaintiff's. The question being, whether the plaintiff could maintain this possessory action before actual entry. *Held*, that as to the fences and buildings the plaintiff could not succeed, but as to the land itself and the destruction of the trees he could, the defendants having made no denial of his property therein. That a nonsuit could not be granted on the terms of the rule.

That where damages were only \$80 a new trial would not be granted to review the award of damages, though the plaintiff could not maintain his action for part of the premises sued for, the rule governing such cases applying here, viz., that the court will not disturb a verdict for mere damages when it does not exceed \$80.

Trespass.—1st count for breaking and entering on lots Nos. 6 and 59, in the village of Bayfield, in the county of Huron, and depasturing the same with cattle.

2nd count,—Breaking and entering same lands, and destroying fences, fruit and ornamental trees, and buildings thereon, and converting the same; suggesting that trespasses were committed after notice not to trespass had been served on defendants according to the C. L. P. Act, sec. 325.

The pleas were, not guilty. That the fences and buildings in the second count were not the plaintiff's, and a denial of the notice not to trespass. Issue.

The cause was tried at the last Spring Assizes held at Goderich, before Morrison, J., when a verdict was rendered for the plaintiff and \$80 damages.

S. Richards, Q. C., in Easter Term last, applied for a rule on the plaintiff to shew cause why a nonsuit should not be entered pursuant to leave reserved, on the ground that the plaintiff was not in possession at the time when the trespasses were committed, that an action of ejectment was then pending for recovery of the premises, and that there was no recovery of the premises in that action, and that there was no entry or no sufficient entry of the plaintiff on the premises before bringing this action, and that such entry cannot relate back so as to make all the defendants in this cause trespassers; and that the defendants were, or one of them was, in possession of the premises at the time of the alleged trespasses, and

subsequently, and for years previously, and that the plaintiff did not make out a right to recover in this action.

Both sides argued this rule without exception, although it does not appear by the notes of the learned judge that any such leave as was moved on was reserved at the trial.

Last Trinity Term *Harrison* shewed cause, cited *Litchfield v. Ready*, 5 Exch. 939; *Barnett v. Earl Guildford*, 11 Exch. 19; *Street v. Crooks*, 6 C. P. U. C. 124; *Anderson y. Radcliffe*, El. Bl. & El. 819; *Buller & Leake*, 2 Edn. 359.

S. Richards, Q. C., relied on 6 C. P. U. C. 124, as expressly in point in the defendants favour.

ADAM WILSON, J.—The principal question at the trial and on the argument before us was, whether the plaintiff could maintain this possessory action before he had actually entered into the possession of the property. So far as the fences and buildings are concerned, which are referred to in the second plea, the defendants are in a position to test their right, but as to the land itself, and the destruction of the trees, the defendants have made no denial of the plaintiff's property, and as to them, therefore, the plaintiff is entitled to recover. There cannot then be a nonsuit on the terms of the rule. It is not worth while then to consider, even if the rule called upon us to do so, whether a new trial should be granted to review the award of damages as to the fences and buildings, although we might be of opinion the plaintiff could not maintain his present action in respect of them, because the total damages are only \$80, to a portion of which the plaintiff is admittedly entitled, and the rule which governs such a case must be applied on the present occasion, not to disturb a verdict for mere damages when the amount does not exceed \$80.

The rule will therefore be discharged.

Per cur.—Rule discharged.

TUER V. HARRISON.

Interpleader issue—Con. Stat. U. C. cap. 26, sec. 18—Bona fide sale in the ordinary course of trade.

An interpleader issue to try the right of the plaintiff to property seized by the sheriff on executions issued by the defendant against C. The plaintiff claimed by purchase prior to the defendant's execution. The judge directed the jury to find (1) whether the purchase by the plaintiff was to defeat or delay the creditors of C (2) was the sale *bona fide*. (3) Was there an actual and continued change of possession. On motion for a new trial for verdict being contrary to law and evidence and for misdirection.

Held, that the jury might have found for the defendant, and such a finding would have been more satisfactory, yet as the case went fairly to them, and the amount involved was small, the verdict should not be disturbed. 2nd, As to misdirection. That under Con. Stat. U. C. cap. 26, sec. 18, a sale of goods for cash would not be void, where a similar sale would not be an act of bankruptcy in England, and that the sale in question would not have constituted such an act there. The words, "in the ordinary course of trade," &c., were inserted in our statute by way of greater precaution to protect the ordinary dealings of parties having mutual accounts where the party selling was not known to be insolvent. That the evidence did not shew C. to be in insolvent circumstances. That the judges charge was virtually to the effect, "That if C. had sold his only horses, when as a farmer he needed them, and when the sale so made would imply a suspicion that the same was not in the ordinary course of dealing, and that if the plaintiff had then purchased, the sale would not have been *bona fide*," and that such direction was in accordance with the statute.

Interpleader issue to try whether certain goods and chattels on the premises of plaintiff seized in execution by the sheriff of York and Peel, under a *fi. fa.*, tested 20th February, A. D. 1863, issued out of this court, and delivered to the sheriff on the 3rd of October, 1863, on a judgment recovered by defendant against one Thomas Charlton, were at the time of the delivery of the writ to the sheriff the property of plaintiff as against defendant.

The cause was taken down to trial at the last Fall Assizes for the United Counties of York and Peel, held before A. Wilson, J.

The plaintiff offered evidence to prove the purchase of the property in question, and the payment of the money for it, to Charlton, on 13th December, 1862. Before that time the present defendant had placed an execution in the sheriff's hands against Charlton's goods, the sheriff had not been able to find the horses and harness in dispute to levy on them under this execution, and on the 13th December, 1862, the *fi. fa.* against goods was returned and a *fi. fa.* against Charlton's lands had been placed in the sheriff's hands.

The plaintiff's evidence shewed that he had taken the

horses into his own possession and kept them for a time, and the witnesses spoke of their being in his stable all the time. This stable, however, was the stable in which Charlton had formerly kept the horses, and which it was alleged that plaintiff had purchased from Charlton. It clearly appeared, that in the summer of 1863 Charlton was employed by a Mr. Thompson for 50 or 60 days to draw gravel with these very horses at \$2 50 per day, and was paid for doing so at that rate. The plaintiff was called as a witness by defendant, he stated he had let the horses to Charlton at \$1 a day, and Charlton was to find pasture for them. It also appeared that Charlton was a blacksmith by trade, and owned some land as well as these horses. There was other evidence offered on both sides, from which the jury might have drawn inferences favorable or unfavorable to plaintiff and defendant respectively.

At the trial Thomas Charlton was called on his subpoena and did not appear.

The learned judge asked the jury to say if the purchase by plaintiff was to defeat or delay the creditors of Charlton. 2. Was the sale *bona fide*. 3. Were the goods in the continuous possession of Tuer or in Charlton's possession, and in whose possession were they at the time of the seizure, if in Tuer's to find for him, if in Charlton's to find for defendant.

McMichael objected to the charge of the learned judge in telling the jury, that if Tuer bought the horses honestly, although Charlton may have sold them to defeat or delay creditors, they should find for Tuer. He contended that Tuer's purchase, however honest, was not protected, unless he bought the horses in the ordinary course of his business, and that selling horses was not Charlton's business.

The jury found for the plaintiff.

In Michaelmas Term last *McMichael* obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, because the verdict was contrary to law and evidence, and for misdirection of the learned judge who tried the cause in charging the jury, that when a sale was made to defeat creditors the sale would not be void under the statute unless the purchaser also shared in

or was privy to the intent, and that the sale mentioned in the evidence from Charlton to the plaintiff was one in the ordinary course of trade.

The rule was enlarged from Term to Term until Trinity Term last, when *Bull* shewed cause. He contended, that as to the law and evidence the case was left to the jury with a charge which was only objected to on one point, and that the finding of the jury would not now be disturbed, merely because they might have found the other way, the evidence being of such a character that it was peculiarly the province of the jury to decide upon the weight they would give to the statements of the witnesses. As to the point of misdirection, he argued, that the question raised was for the jury to determine, and if the defendant's counsel had desired that the jury should find expressly whether the sale of the horses was in the ordinary course of trade or calling by Charlton, then he should have requested the judge so to have left it to the jury; that not having done so he could not now be permitted to raise the question. He contended, however, that all the statute could require when there was an absolute sale of property for a fair price for cash was, that the purchaser should act in good faith and not with any fraudulent intent; that the jury had so found in this case, and the verdict ought not to be disturbed. He further urged, that as the property in question only sold at the sheriff's sale for \$55, and plaintiff only paid £20 for it, the court would not grant a new trial on the question of fact. As to misdirection he was satisfied defendant must fail. He cited *Ross v. Elliott*, 11 U. C. C. P. 221; *Doe Prince v. Girty*, 9 U. C. Q. B. 41; *McDonald v. McHugh*, 12 U. C. Q. B. 503; *Connell v. Cheney*, 1 U. C. Q. B. 307; *Wickes v. Clutterbuck*, 2 Bing. 483.

McMichael contra, contended that sec. 18 of Con. Stats. of Upper Canada, made void as against creditors, the sale of any goods by an insolvent, or one on the eve of insolvency, when made with intent to defeat or delay creditors in the recovery of their debts. He urged that that was the policy of the statute according to its very word, and that the proviso that nothing in the section should invalidate any *bona fide* sale of goods in the ordinary course of trade or calling to

innocent purchasers, shewed clearly that the view of the statute contended for by him was correct. He also urged, that if the court was against him on this point that a new trial should be granted, as the verdict was not satisfactory.

RICHARDS, C. J.—I am of opinion that this rule must be discharged on both grounds. As to the verdict being contrary to evidence, though the jury might well have found for the defendant, and such a finding would have probably been more satisfactory than the present verdict, yet, as they took the most favorable view of the plaintiff's case, after hearing all the evidence, I cannot say that the evidence so strongly preponderated in favor of the defendant as to justify the court in setting aside the verdict. The charge of the judge is not complained of as to this point, and the amount involved is not so great as to make it desirable to protract this litigation.

As to the ground of misdirection, the words of our Con. Stat. U. C., cap. 26, sec. 18, are not precisely the same as the English bankrupt acts of 6 Geo. IV., cap. 16, sec. 3, and 12 & 13 Vic., cap. 106, sec. 67. But it seems to me they are in effect the same. That part of 6 Geo. IV., cap. 16, sec. 3, applicable to the question under discussion is, "that if any trader shall make any fraudulent grant or conveyance of his lands, tenements, goods or chattels, * * * or shall make any fraudulent gift, delivery or transfer of any of his goods or chattels, with intent to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy." The provision in Imp. Stat. 12 & 13 Vic., cap. 106, sec. 67, is substantially the same, if not in the very words of the act of George IV.

The words of our act necessary to be referred to are, "in case any person being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, makes any gift, conveyance, assignment or transfer of any of his goods, chattels or effects, with intent to defeat or delay the creditors of such person, or with intent of giving one or more of the creditors of such person a preference over his other creditors, every such gift, conveyance, assignment, transfer or delivery, shall be null

and void as against the creditors of such person ; but nothing herein contained shall invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of such debtor their just debts ; and nothing herein contained shall invalidate or make void any *bona fide* sale of goods in the ordinary course of trade or calling to innocent purchasers."

The word *fraudulent* in the English act, in my judgment, can make no difference, for both by the Statute of Elizabeth and at Common Law it was a fraud to make a conveyance of property to defeat or delay creditors in the recovery of their debts.

The decisions under the English act would seem to me to apply to our own statute ; and in considering the latter statute the proviso must not be overlooked : that which would not constitute an act of bankruptcy under the English act would probably not make a sale void under our act, always considering our statute without the proviso, as to the effect of which I shall express my opinion presently. In *Baxter v. Pritchard*, 1 A. & E. 456, the bankrupt Hill assigned the lease of his premises, all his book debts, stock in trade, furniture and effects to the defendant, who took them at a valuation. Hill having obtained the purchase money fled to America. The jury expressly found that he had made the assignment with the intention of defrauding his creditors, but that the defendant was no party to the fraud. Lord Denman in giving judgment observes : " It is remarkable that the word *sale* does not occur in this clause, and equally so that none of the older cases turn on a sale accompanied with payment of the full price." In concluding his judgment he said, " we are of opinion that the sale of a tradesman's stock to a *bona fide* purchaser, who pays the fair price for it, in ignorance of any fraudulent intention of the seller, is no act of bankruptcy." In giving the judgment he refers to the contingency of a sale by a trader in the ordinary way in the course of his business constituting an act of bankruptcy. In that view, if the trader had the fraudulent intent, whilst the purchaser knew nothing of his circumstances, the latter would be defrauded of his

money by no apparent fault of his own. In *Rose v. Haycock* (reported in a note to *Baxter v. Pritchard*, at p. 460-61, of 1 A. & E.), Lord Tenterden concludes his judgment in these words, "A fair and *bona fide* sale is scarcely within the mischief for which the Bankrupt Act proposes a remedy."

In *Hill v. Farnell*, 9 B. & C. 45, the defendant purchased from the bankrupt, who was a hop merchant, a library of books and paid him for them. The merchant had at that time committed an act of bankruptcy of which the defendant had no knowledge. It was held the assignees could not bring trover against the defendant without tendering the price, as by the 82nd sec. of 6 Geo. IV., cap. 16, the payments made in good faith to the bankrupt were valid, and to give full effect to that enactment defendant ought to have a lien on the books until he was repaid the money he gave the bankrupt for them.

Lee v. Hart, 10 Ex. 555, affirmed in Exchequer Chamber, 11 Ex. 880, decided that where a trader sold goods considerably below the market price it was not a fraudulent transfer within sec. 67 Bankrupt Act, 12 & 13 Vic. cap. 106, to render the transaction fraudulent within that act the trader must have intended the sale to defeat or delay his creditors, and the purchaser must have been aware of or had reasonable grounds of knowing such intention. *Baxter v. Pritchard* was referred to.

In giving judgment in the Exchequer Chamber in the case, *Wightman, J.*, said, "The statute does not mention '*sales*' as one of the fraudulent modes by which an act of bankruptcy may be committed; but a sale of goods at a low rate may be a fraudulent transfer, if the seller did not intend to sell the goods *bona fide* for carrying on his business but for the purpose of defeating or delaying his creditors, and the purchaser has reason to know that such is the object of the seller."

In *Pennell v. Reynolds* (5 Law Times, N. S. C. B. 286), *Willes, J.*, said, "Before you can hold a deed invalid, you must be satisfied that part of the substantial object which the parties had in view was to stave off the creditors from a substantial portion of the property, and interfere with the creditors, and to delay and therefore to defraud them. Now that object must not only be the object of the bankrupt, but

also the object of the person dealing with him, in order to make the transaction invalid as an act of bankruptcy." I find this case referred to and approved in some of the late reports.

I have looked at all the cases noted below. Most of them turn more or less on the validity of assignments made by persons who were on the eve of bankruptcy, but which were made in pursuance of a promise to give security when the money was advanced to them, or when some money was advanced at the time the instrument was executed: *Hutton v. Cruttwell*, 1 E. & B. 20; *Smith v. Cannan*, Exch. 2 E. & B. 35; *Young v. Waud*, 8 Ex. 221; *Hale v. Alnutt*, 18 C. B. 505; *Harris v. Rickett*, 4 H. & N. 1 (affirms *Hutton v. Cruttwell*); *Bell v. Fairbarns*, 2 H. & N. 410; *Ex parte Assignees of Kindred v. Kindred*, 29 Law Times, 250; *Ex parte Robinson*, 32 Law Times, 230; *Edwards v. Glyn*, 33 Law Times, 236; *Smith v. Timms*, 4 Law Times, N. S. 828, virtually confirms *Hale v. Alnutt*, and this case is affirmed in *Ex Chamber*, 7 Law Times, N. S. 859, where *Pennell v. Reynolds* is approved; *In re A Disputed Adjudication*, 4 Law Times, N. S. 809; *Whitmore et al v. Claridge*, 6 Law Times, N. S. 431, affirms *Hutton v. Cruttwell*, *Bittlestone v. Cooke*, and *Pennell v. Reynolds*, approved in Exch. 9 Law Times, N. S. 451. See also *Holderness v. Rankin*, 6 Jr. N. S. 903, 928; *Bittlestone v. Cooke*, 6 E. & B. 296.

The following cases contain some data that will be favorable to the defendant's view of the law: *Smith v. Cannan*, 2 E. & B. 35; *Fraser v. Levy*, 6 H. & N. 16; *Lacon v. Liffen*, 7 Law Times, N. S. 774; *Judgment of Lord Westbury*.

I come to the conclusion that under the clause of our statute, a sale of goods and chattels for ready money would not be void, when a similar sale would not be an act of bankruptcy in England. It would seem to create a very anomalous state of things to clog the sale of property in this country, where the bankrupt laws are not in force, with greater restrictions than prevail in England, where the system of bankruptcy has been incorporated in their code of laws for very many years. It is true that by the proviso to our statute a sale in the usual course of business is pro-

tected, which in some of the English cases is suggested as a reason for holding these acts did not apply to such a sale ; but I think we may properly hold that in our statute it is inserted by way of greater precaution and to protect the ordinary dealings between parties having mutual accounts, when it was not known that the party selling was insolvent.

In the case before us I do not well see how the question of insolvency could arise. All the evidence I observe on the subject in the learned judge's notes is, that an execution against Charlton's goods was returned *nulla bona*, and that a *fi. fa.* against his lands was issued on the same day, as to which there is no evidence to shew whether it was ever returned or not. It does not appear what was the amount due the plaintiff on the execution, or what was the value of Charlton's lands, nor if that execution had been returned before the *fi. fa.* against goods referred to in this issue was issued. One of the witnesses speaks of Charlton's owning thirty acres of land, and having sold but one to the plaintiff in this issue. It seems to me that no sufficient evidence of insolvency was made out.

As to the horses being sold in the ordinary course of trade or calling, it is difficult to apply that section to a person situated as Charlton was, and to the ordinary course of dealing with horses in this country. There are but few persons in Canada who make a business of buying and selling horses only. There are but few persons, farmers and mechanics, living in the country, who do not buy and sell horses very often. Whether that would be considered in the ordinary course of business or not, within the meaning of the statute, might be disputed ; and when a man combined both conditions of mechanic and farmer, it seems to me that there was not much use in referring to the jury the question of the sale being in the ordinary course of trade or calling, in the very words of the statute, if the sale was not void on the ground put by the learned judge to the jury. The charge would be right according to defendant's own showing, if it had been to this effect. " If Charlton sold the only horses he had when as a farmer he needed them, and when the sale would reasonably imply suspicion that it was not in the usual course of dealing, but for defrauding his creditors by

delaying or hindering them from recovering their debts, and if plaintiff purchased them with that view, then the sale would not be *bonâ fide*, and would be bad." This seems to me to be the effect of the charge, and nothing more would be virtually decided, if it had been put to the jury as desired by defendant's counsel.

On the whole, I see no reason for granting the new trial on any of the grounds suggested, and am of opinion the rule must be discharged.

Per cur.—Rule discharged.

IN RE. KELLY (RELATOR) V. MACAROW (AN ALDERMAN).

Application for quo warranto—Want of qualification in an alderman—Proceedings to unseat—How made.

In this case a rule was issued calling on M., an alderman, to shew cause why an information in the nature of a *quo warranto* should not be exhibited against him, upon the ground that the said M. had not the property qualification required by statute. (The objection to the qualification being that though he was rated for 1863 to the amount of \$344, on leasehold property, yet since May, 1863, he had ceased to hold part of the property to the value of \$160 per annum).

It appeared that the said M. and one B. were elected at the January election without opposition; that the relator stood by and made no objection to the return of M.

Held, that the court, in carrying out the obvious intention of the legislature, will not grant leave to file an information in the nature of a *quo warranto*, to disturb a person in an office which he holds only for a year, and at whose election the relator was present and made no opposition.

That Con. Stat. (Municipal Act) 127, has rather limited than increased the number of persons allowed to be relators by 12 Vic., ch. 81, sec. 146.

That the legislature having provided a cheap, speedy and convenient remedy, the court will not, in general, allow parties to resort to the more expensive one. That the general practice is to confine parties aggrieved to the relief to be obtained under the statute.

Quære, whether the qualification set out was sufficient, *Reg. ex Rel. Dexter v. Gowan* being opposed to such a conclusion.

In Hilary Term last *Harrison* obtained a rule calling on Daniel Macarow, of the city of Kingston, Esquire, to shew cause on the first day of Easter Term, why an information in the nature of a *quo warranto* should not be exhibited against him at the instance of Thomas Fitzroy Kelly, as relator in the name of the Master of the Crown office, or otherwise, as the court might direct on behalf of Her Majesty the Queen, to shew by what authority he claims to exercise

the office of an Alderman for Ontario Ward in the corporation of the city of Kingston, upon the ground that the said Daniel Macarow had not at the time of his election, in his own right or in the right of his wife, as proprietor or tenant, freehold or leasehold property rated in his own name, or in that of his wife, on the last assessment roll of the said city of Kingston, to at least the value following:—freehold to one hundred and sixty dollars per annum, or leasehold to one hundred and sixty dollars per annum—(this was admitted to be a mistake, and that it ought to have been or leasehold to the value of three hundred and twenty dollars per annum)—and was not otherwise qualified to be elected to the said office.

The objection to the qualification was that though he was rated on the assessment roll for 1863, as lessee of three separate buildings, the aggregate rent of which amounted to \$344, as to one of these buildings, the rental of which was \$160 per annum, he had ceased to be the lessee of it after the 10th of May, 1863, from which time it had been in the possession and occupation of another person as tenant, and the said Macarow had not any interest therein.

From the statement of Kelly, it appeared that the municipal election for Ontario ward was held on the 4th of January last, and that Daniel Macarow and James Baker were elected and returned as aldermen, without any poll being demanded, and two councillors were also elected at the same time, without any poll being demanded, there having been no opposition publicly expressed to the nomination and election of the said aldermen and councillors. Kelly also stated that Macarow, just before the election, asked him to second his nomination for alderman, but he refused so to do, and did not consent to Macarow being elected as aforesaid, (though he was doubtless present at such election, and it does not appear that he openly expressed any dissent to such election). He further stated that before and at the time of the election of Macarow he was not aware of his want of qualification for the office.

During the term *S. Richards*, Q. C., shewed cause and contended that the court would not now allow a person who was present at an election to take proceedings to oust a per-

son elected without opposition, the time for making the application under the Municipal Institutions Act having expired. He also contended that the legislature having provided a more convenient, speedy, and less expensive remedy to test the right of an alderman to hold his office, than the application for leave to file an information, the court would not grant such leave. He further urged that Kelly was not, under the statute, qualified to be a relator, because he was not a candidate at the election, or an elector, who gave or tendered his vote thereat. He also argued that as it appeared from the affidavit filed that Macarow, after giving up the house on Queen street, the rental of which was \$160, had, before the election, *bonâ fide* become the tenant of another house on Wellington street at a rental of \$180 a year, which he then held, so that at the time of the election he was *bona fide* possessed of leasehold property of the yearly value of \$320 per annum and more. He referred to Reg. ex Rel. White v. Roach, 18 U. C. Q. B. 226; Cole on *Quo Warranto*, 165; Municipal Institutions Act, Con. Stat. U. C., ch. 54, sec. 127 & 128. He also urged that it was not shewn there was any other person in the municipality qualified to be elected alderman, and under sec. 72 of the act just referred to, the only qualification necessary was that of an elector, which the papers filed clearly shew Macarow to have possessed.

Sir H. Smith, Q. C., contra, contended that Macarow was clearly not qualified, and that from the first his qualification was colorable. He referred to Reg. ex Rel. Dexter v. Gowan, 1 Practice Reports, 104. He argued that as Kelly did not know of the want of qualification it could not be urged that he ought to be estopped from bringing it forward now; that merely not bringing forward another candidate could not properly be considered as acquiescing in the election of the person proposed. He strongly urged that as the proceeding could not be taken under the statute because there was no other candidate nor elector who voted or offered to vote at that election, the court ought to permit the information to be filed. He referred to Reg. ex Rel. Coleman v. O'Hare, 2 U. C. Practice Reports 18, as direct authority in his favour on these points. He contended that the facts

developed by the affidavits shewed that the party complained against had been from year to year renting houses, not for the purpose of occupying them but to create a fictitious qualification, and that it was of great importance that only duly qualified persons should be allowed to sit in the city councils, particularly as these corporations had such extensive powers of running into debt. That the court ought to encourage applications to have disqualified persons turned out of the municipal councils. He also referred to *Reg. ex Rel. Mitchell v. Adams*, 1 Chamber Reports, 203, *Reg. ex Rel. Lawrence v. Woodruff*, *Ib.* 119.

RICHARDS, C. J.—We think this rule ought to be discharged. Looking at the course of legislation on this subject, we are of opinion that we exercise a wise discretion, and carry out the obvious intention of the legislature when we refuse to grant leave to file an information to disturb a person in the exercise of an office to which he was elected without opposition, and to which he is only elected for one year, when the person now asking leave to file that information was present at such election, and did not then object to the election of the person now complained against. On referring to 12 Vic., ch. 81, sec. 146, and the present Consolidated Municipal Act, sec. 127, it will be seen that the legislature, instead of extending the class of persons who were allowed to become relators under the act, has rather limited it. Under the former act a summons, in the nature of a *quo warranto*, might issue at the instance of any relator having an interest as a candidate or voter in any election, whilst under the present act any candidate at the election, or any elector *who tendered his vote thereat*, may become a relator.

The fact that the legislature has provided a cheap, speedy and convenient mode of trying these elections, and the right of parties elected to hold their seats is a strong argument why we should not grant leave to parties to resort to the more expensive and inconvenient mode which existed before the passing of our municipal acts. As a general rule, we think, if we encouraged proceedings of this character, in this form, we should be doing that which it was the intention

of the legislature should not be done at all, or if done, should be carried out in the way provided by the Municipal Act.

Without going so far as to decide that in no case would we grant leave to a party to file an information when there has been an improper election, yet, looking at the judgment in the Court of Queen's Bench, *Reg. ex Rel. White v. Roach*, I think it may be considered the general practice of both courts to confine the parties aggrieved to the relief that can be obtained under the statute.

It is urged that when a disqualified person has been elected without opposition, the Municipal Institutions Act makes no provision for proceeding under it to contest the election, because there would have been no other candidate and no elector could have given or tendered his vote thereat. The obvious and ready answer is that the legislature thought if no elector took sufficient interest in the subject to propose a qualified person as a candidate, and to offer to vote for him, that it was scarcely necessary to provide that such an election should afterwards be contested because some elector had become awakened to the importance of having only properly qualified persons elected members of the corporation. If all the electors were so little inclined to assert their rights as not to have a person nominated to oppose the disqualified person, it would not be unreasonable to suppose that the legislature intended that they should have until the next election to gather energy enough to exercise some little activity in relation to their municipal affairs.

We do not consider it necessary to go into the other points raised on the argument or suggested by the affidavits. I have not made up my mind that the qualification set up by Macarow is sufficient, the case of *Reg. ex Rel. Dexter v. Gowan* appears to be against the qualification, and it does seem singular that he should have leased a house so long ago as January last, which it is not shewn that he has occupied up to the present time. What was his position between the latter part of April, 1863, when he gave up the house on Queen street, and the beginning of January, 1864, when he took the house on Wellington street, was he qualified to serve and be elected during that period? We think the rule should be discharged.

Per cur.—Rule discharged.

THE QUEEN ON THE PROSECUTION OF THE TRUSTEES OF ST.
ANDREW'S CHURCH V. THE GREAT WESTERN
RAILWAY COMPANY.

*Mandamus nisi—Return thereto—Stats. 18 Vic., ch. 180, and 20 Vic., ch. 146
—Limitations of remedy under.*

The *mandamus nisi* set out the provisions applicable in statutes 18 Vic., ch. 180, and 20 Vic., ch. 146, by which the prosecutors claimed the right to have an arbitration to settle the amount of their claim against the Great Western Railway Company. The company returned to the writ, that the prosecutors had not commenced proceedings to entitle them to a reference within six months after the passing of the first act. The prosecutors demurred, contending the provisions of the first act had been altered and extended by the second act, and they had done all that the second act required of them to establish their claim to have an arbitration.

Held, that under 18 Vic., ch. 180, the prosecutors would have been barred, not having commenced proceedings within six months after the passing of that act. That 20 Vic., ch. 146, having extended its provisions much beyond those of 18 Vic., ch. 180, and extended the rights thereunder beyond those explained in section 1 to be within the meaning of the words *private rights*, the rights defined in the 20 Vic., ch. 146, were not restricted by the provisions of 18 Vic. to those only who had commenced proceedings within six months of the passing of the latter act. That the notice required to be given within three months after the passing of the act 20 Vic. was the only condition precedent to the prosecutors' right to recover.

Held, further, that the prosecutors were entitled to a *mandamus* under 20 Vic., though they might have submitted their case to a jury as well as to arbitration had they so chosen.

Seemle, that the court would not have interfered by *mandamus* had not the prosecutors' remedy by suit probably been barred by 16 Vic., ch. 99, sec. 10.

The *mandamus nisi* recited that by the 4 Wm. IV., cap. 29, it was enacted that the company thereby incorporated, and now represented by the Great Western Railway Company, was thereby empowered to contract with the owners and occupiers of the lands which the company should require, or for the damages which the owners or occupiers should be entitled to receive from the company in consequence of the railroad being made upon their land, and in case of disagreement between the company and the owners or occupiers, the owners or occupiers might nominate one or more indifferent person or persons, and the company might nominate an equal number of indifferent persons, who, with one other person, to be elected by ballot by the persons so named, should be arbitrators to award what the company should pay to the respective persons entitled to receive the same. The award of a majority of such arbitrators to be final. That by the 18 Vic., ch. 180, the company was empowered to make a fixed and permanent bridge across the river Humber, pro-

vided that if the permanent bridge instead of a swing bridge should invade or abridge any private rights, the company should indemnify all parties who might be so injured, and in case of disagreement between the company and the parties as to the amount of any such damages, the same should be ascertained in the same manner as provided for in regard to other claims for compensation against the company. That by the 20 Vic., ch. 146, it was enacted that the words "private rights," in the last mentioned act, were intended to include, and did include the rights, whether possessory or reversionary, which parties occupying, leasing, or owning lands on the bank of the river Humber, had to use the river as a highway or as a means of approach or access to or egress from the said property by vessel or otherwise; and that all parties occupying, leasing or owning lands on or near to the banks of the river, who should be prevented, by the erection of a permanent bridge by the company across the river, from approaching or gaining access to or egress from such lands by vessel or otherwise, or from using the river as beneficially or amply as they had been entitled or accustomed to use the same before the erection of such bridge, and who should give notice to the company, within three months from the passing of the act, of their claims or intention to make claim for compensation in consequence of the erection of such bridge, should be entitled to compensation from the company, and that the company should indemnify all parties so injured or abridged in any way of the rights aforesaid, or hindered or prevented from using the said river in manner aforesaid. And in case of disagreement between the parties and the company, as to the amount of compensation, that the same should be ascertained in the same manner as is provided for in regard to other claims for compensation against the company.

The writ then recited that the company, under the act, made a fixed and permanent bridge across the Humber, and that before the construction of the bridge, and ever since, one Wm. Gamble was in possession of lot No. 41, and the westerly part of lot No. 40, in the 1st concession from the bay in the township of York, lying on the river Humber, as tenant of the trustees in behalf of the St. Andrew's Church,

in connection with the Church of Scotland, in the city of Toronto, the owners of the reversion in the said lands ; and that the trustees were and are entitled, under the said acts, to receive compensation from the company for the damage, loss and injury sustained by them by the means aforesaid ; and that the trustees did, within three months from the passing of the 20 Vic., give notice to the company of their intention to make claim for compensation, in consequence of the erection of such bridge, stating the nature, extent and particulars of such damage, loss and injury, and the amount of compensation claimed in respect thereof ; and that the trustees could not agree with the company as to the amount of such compensation, and thereupon afterwards, to wit, on or about the 25th of July, 1860, the trustees did nominate and appoint Edward W. Thomson, of the township of York, Esquire, an indifferent person, their arbitrator in respect of the premises under the statute in that behalf, and did, on the day and year last aforesaid, give the company notice of such appointment, and did then require the company to nominate and appoint another indifferent person, who, together with the said Edward W. Thomson, and one other person to be elected by ballot by the said Edward W. Thomson and the said other indifferent person, should be arbitrators to award the sum of money which the company should pay to the trustees by way of compensation for the damage, loss and injury sustained by them by the means aforesaid ; and that no agreement had yet been made with the company as to the sum of money to be paid by the company to the trustees by way of compensation as aforesaid ; and that the company had wholly neglected and refused, and did still neglect and refuse to nominate an indifferent person for the purposes aforesaid, in contempt, &c., and to the great hurt and prejudice of the trustees. The company was then enjoined to nominate and appoint an indifferent person in the manner directed by the said acts of parliament, who, together with the said Edward W. Thomson, and one other person to be elected by ballot, should be arbitrators to award the sum of money to be paid by the company by way of compensation for the damage, loss and injury done to the said reversionary estate, and which had been sustained the by trustees by

reason or in consequence of the making and construction of the said permanent bridge, or to show cause before this court why they should not do so.

The return which has been made by the company is as follows: That not denying the liabilities legally resulting from the erection of the bridge across the river Humber, they say, that by the 18 Vic., ch. 180, it is provided the company should indemnify all parties injured by the said bridge as in the act provided, who should make claims upon the company, and proceedings for the recovery thereof commence within six months from the passing of the said act, and not afterwards; that although by the 20 Vic., ch. 146, such indemnification was extended to such parties entitled to the same, who should give notice to the company of an intention to claim compensation within three months from the passing of the said act, and although it is alleged the trustees are entitled to claim compensation from the company, and that they have given notice as by the act is required, yet the trustees did not make any claim for compensation upon the company, and proceedings for the recovery thereof commence within six months from the passing of the said several acts passed in the 18 Vic., ch. 180, and in the 20 Vic., ch. 46, or of either of them; and, therefore, for the said causes, or for some or one of them, the company cannot nominate and appoint some person, as in the writ is mentioned, who, together with the said Edward W. Thomson, should proceed as by the writ is mentioned, and as by the same writ the company is commanded.

The prosecutors except to the return on the following grounds: That the return traverses a matter of fact not alleged in the writ, and not material or necessary to be alleged; that the return is uncertain in this, that it alleges the prosecutors did not make a claim and commence proceedings within six months, whereas it should have been that neither was a claim made nor were proceedings commenced, or it should have alleged which of the two had not been done; that in traversing that a claim was made within six months, it traverses and brings into issue again a matter already determined by the court; that the return traverses a matter of law resulting from the facts alleged in the writ,

namely, that proceedings were commenced ; that the return is no sufficient answer to the writ—and shows no reason why the company should not have obeyed it.

Last Trinity term *H. Cameron*, on behalf of the prosecutors. That part of the return, “yet the trustees did not make any claim for compensation, &c.,” is the portion which is objected to. The 18 Vic., ch. 180, gave compensation to all parties who were injured, who commenced proceedings in six months without regard to notice. The 20 Vic., ch. 146, gave compensation to all such persons who gave notice in three months after the act without regard to commencing proceedings. If a matter has been already pronounced upon by the court it cannot be agitated again. Tapping on *Mandamus*. The traverse should not have been of a conclusion of law. Tapping, 351-7. The traverse should have been that the prosecutors did the acts entitling them to an arbitration, and not that the prosecutors did not commence their proceedings within six months, which, as before stated, is no answer. If it were necessary to have commenced proceedings within the six months, and to have alleged it, the writ does sufficiently shew that such proceedings were commenced within the six months, for the appointment of a person as arbitrator, and notice of that appointment to the company, must be a “commencement of proceedings” within the statute, otherwise the company, by their mere wilful refusal to appoint an arbitrator, could always deprive persons entitled to compensation or of ever obtaining it.

Irving, Q. C., contra, contended before, (in XII. U. C. C. P. 399,) and he contends now, that the proper tribunal for the prosecutors is to prosecute their claim before a jury under the 16 Vic., ch. 99, sec. 5. The objection that the proceedings were not commenced within six months was not decided upon before, and it is now properly raised by the company. *Clarke v. The Company of Proprietors of the Leicestershire and Northamptonshire Union Canal*, 6 Q. B. 898 ; Tapping on *Mandamus*, 354-374 ; *The King v. The Margate Pier Co.*, 3 B. & A. 220. This writ is to be construed as a declaration. *The King v. The Bishop of Oxford*, 7 East. 345 ; Tapping on *Mandamus*, 309. The allegation of proceedings having been

commenced within six months is entirely omitted from the writ. By the 20 Vic., ch. 146, it is provided that in case of difference, such as is alleged here, the same shall be settled by the company's acts. These acts are 16 Vic., ch. 44, sec. 8, and ch. 99, sec. 5, which provide for an arbitration, and for a trial by jury also. Both the claim must be made on the company and proceedings commenced within the six months mentioned in the 18 Vic. He referred to *Mayor of Salford, &c. v. Ackers*, 16 M. & W. 85; *Gill v. Scrivens*, 7 T. R. 27; *The Queen v. The Trustees of the Norwich Savings Bank*, 9 A. & El. 729.

ADAM WILSON, J.—The whole question is, whether the prosecutors should have commenced proceedings against the company within six months after the passing of the 18 Vic., ch. 180, that is, from the 19th of May, 1855, or at any rate within six months after the passing of the 20 Vic., ch. 146, which amends and explains the first act, that is from the 10th of June, 1857, assuming that the notice required to have been given by the prosecutors under the last act, and which was given, is not of itself a commencement of proceedings?

The first act was quite explicit, "that all claims under it should be made upon the company, and proceedings for the recovery thereof be commenced within six months from the passing of this act and not afterwards," and if the second act had not been passed there could have been no question that the trustees would have been barred of their claim, if they did not commence proceedings to enforce their claim as well as make it within the limitation of six months. It may be then, that the prosecutors had no enforceable claim against the company at the time of the passing of the second act, and it may be that they and others were in this position by reason of the indefiniteness of the expression of "private rights."

By the second act that is more than eighteen months after the period of the six months allowed by the first act, within which the proceedings were to have been commenced, had terminated, the legislature defined what should be deemed to be within the phrase of "private rights," and the legislature

also enacted, for the first time, in a substantive clause, that all persons occupying, leasing or owning lands, not merely "on the banks of the river," which are the words used in section one, which defines the meaning of "private rights," but on "or near" to the banks of the river, who shall be prevented, by the erection of a permanent bridge across the river, from approaching or gaining access to or egress from such lands by vessels or otherwise, which may be considered to be specially the rights included in section one, but "from using the river as beneficially or amply as they had been entitled or accustomed to use the same before the erection of the bridge," shall be entitled to compensation, thus extending the provisions of the new act much beyond those of the first act, and beyond those also which are explained in the first section to have been intended to be within the meaning of the first act under the expression of "private rights."

In such a case, therefore, we should scarcely think that the legislature meant to have restricted the rights in the second act to those persons only who had commenced proceedings within the six months after the passing of the first act, if it did, we must suppose that the legislature would have declared in express terms, in the new act, that the claims which were made under it should be only those which were commenced within the time prescribed in the first act; not having done so, and not intending, as we must presume, to do so, or to act so unreasonably as to tell persons that they had certain rights all along under the first act, although they could not have known them, and to tell them at the same time, when the existence of these rights was for the first time communicated to them, that the statute which had declared their rights, and had professed to provide the means for securing compensation for them, had declared also that these rights were valueless, because they had not been prosecuted more than eighteen months before they had ever arisen or before they were ever known. We must conclude that the statute made a new provision altogether for the rights under the first as well as under the second act, by a new enactment as to the means of enforcing these rights, applicable to the new circumstances existing at the passing of the second act.

The second act provides that all persons who have such claims shall give notice of them to the company within three months from the passing of that act, and they shall be entitled to compensation for them. We can add no other condition to the recovery of such compensation, if we did it would plainly defeat the object of the legislature.

It is not necessary to say what would have been a commencement of proceedings within the language of the first act, as we are of opinion that that restriction has been entirely departed from in the new act; but if it had been necessary to have decided the point, it would have been very difficult to say that such language, by no means technical, was not as applicable to a statutory reference, which is a proceeding, as to an ordinary contested suit. The expression "legal measures," which is much stronger than the mere word "proceedings," does not necessarily mean the institution of *legal* proceedings. *The Queen v. The Commissioners of the Port of Southampton*, 1 B. & S. 5.

The only other question is whether the prosecutors, whose claims under the 20 Vic., ch. 146, are to be ascertained and decided "in the same manner as is provided for in regard to other claims for compensation against the company, in and by their act of incorporation, or the act incorporated therewith," can maintain their right to a mandamus when the 16 Vic., ch. 99, sec. 5, gives the claimant the right of submitting his case to a jury, which no doubt he can do without the consent of the company, as well as the right of a reference to arbitration. The rule is that if there is a remedy not less effectual than by mandamus, the writ will not be granted. *Reg. v. Hull and Selby Rail Company*, 6 Q. B. 70. In that case the writ was refused because an action of debt would lie for the demand and be an ample remedy; but it is said in 1 B. & S., before cited, fo. 22, "we constantly grant a mandamus against railway companies in cases where an action would lie against them." *Twyman v. Knowles*, 13 C. B. 222. Yet notwithstanding this, we might not have interfered by mandamus, but have left the prosecutors to their suit at law, if it had not been that their remedy by suit may probably be barred by 16 Vic., ch. 99, sec. 10, because it has not been commenced within the limitation therein prescribed,

and as it is not just that a claim of this kind, rightly taken by the prosecutors for an arbitration and given by a special act of parliament, should, under the circumstances, be defeated by such a defence, we think the writ ought not to be refused to them for such a cause. If the objection had been available, we think it would not have been too late still to except to the propriety of the issuing of the writ in consequence of the prosecutors having another sufficient and effectual remedy for their rights, according to the cases cited in 3 B. & A. 220, 6 Q. B. 898, and Reg. v. Ledgard, 1 Q. B. 616. We think the return is not sufficient in law, and that it should be quashed, and that a peremptory mandamus should be ordered to be issued.

Per cur.—Mandamus granted.

REGINA V. SWITZER.

Indictment—Demurrer to—Con. Stat. cap. 6, sec. 20.

Demurrer to an indictment. The first count charged that the defendant, after having made the alphabetical list of persons entitled to vote, &c., made out a duplicate original of the said list, and certified by affirmation to its correctness, and delivered the same to the clerk of the peace, and that in making out the certified list, *so delivered to the clerk of the peace*, of persons entitled to vote, &c., the defendant did feloniously omit from *said* list the names of &c., which names, or any or either of them, ought not to have been omitted. The second count was nearly the same as the first, the word "insert" being used where the word "omit" was used in the first

Held, that the omission charged having been from the certified list delivered to the clerk of the peace, or "duplicate original," the words "*said list*," referring to the words "*the certified list so delivered to the clerk of the peace*," was a sufficient description to identify the list intended.

As to the objection that it did not appear that the persons whose names were charged to have been omitted, &c., were persons entitled to vote, &c.

Held, that the words in the indictment were not a direct and specific allegation that those persons were entitled to vote.

As to the objection that it was not alleged that the list was made up from the last revised assessment roll,

Held, that by the indictment it appeared that the assessment roll referred to was the assessment roll for 1863, and that it was sufficiently stated that the alphabetical list was made up for that year, and that the Crown would be bound to prove such a list.

Held, further, that both counts of the indictment were bad, as they should have shewn explicitly how, and in what respect these names should or should not have been on the list, by setting out that they were upon, or were not upon the assessment roll, (as the case might be,) or at any rate were or were not upon the alphabetical list.

The indictment in this cause which was found at Court of Oyer and Terminer, and general gaol delivery for the United

Counties of York and Peel, was removed into this court by *certiorari*.

The first count states that William Switzer was and is clerk of the township of Albion, in the county of Peel; that the said township was and is a municipality; that while William Switzer was such clerk, to wit, on *the nineteenth* day of May, in the year 1863, the assessment roll of and for the township of Albion for the last mentioned year was duly and finally revised and corrected according to law, and that after the said final revision and correction of the said assessment roll,* (see second count,) and while Wm. Switzer was such clerk, and before the 1st October in the last mentioned year, to wit, on the 19th May, in the last mentioned year, Wm. Switzer did make an alphabetical list of persons entitled to vote at the election of a member to serve in the legislative council or legislative assembly, within the township of Albion, together with the number of the lot, or part of lot, or other description of the real property in respect of which each of such persons was qualified and entitled to vote, and did then and while he was such clerk, make such list as, and for a correct alphabetical list of all persons entitled to vote at the election of a member of the legislative council or legislative assembly within the township of Albion, according to the provisions of ch. 6 of the Consolidated Statutes of Canada, and did then, and while he was such clerk, certify by affirmation before two justices of the peace of the United Counties of York and Peel to the correctness of the list so by him made out, and did then and thenceforward keep such certified list among the records of the township of Albion, and did also, to wit, &c., and while he was such clerk, and before the 1st day of October, in the year aforesaid, make out a duplicate original of the said list, and certify by affirmation before two justices of the peace of the said united counties, to the correctness of said duplicate original of the said list, and did deliver, and cause to be delivered to the clerk of the peace of the said united counties, the said duplicate original so certified by affirmation as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present that Wm. Switzer, on, to wit, the 30th of May, aforesaid, in making out the said certified list so delivered to

the said clerk of the peace as aforesaid, of persons entitled to vote at an election of a member to serve in the legislative council or assembly, did feloniously and wilfully omit* from the said list the names of Doctor Dalton, William Jessop, James Murray, Robert Whitters, William Stinson, and John Harper, which names, or any or either of them, ought not to have been omitted from the said list, so that and thereby the said list, so certified and delivered to the clerk of the peace as aforesaid, was not the correct list of all persons entitled to vote at any election aforesaid, according to the said assessment roll of the said township of Albion, as finally revised and corrected as aforesaid, against the form of the statute, &c.

The second count is precisely the same as the first down to the word *omit*, marked with an asterisk, excepting that in the second count after the allegation in the first count, "that after the final revision and correction of the said assessment roll," marked with an (*) asterisk, are inserted the following words: "*and while the said assessment roll was the then last assessment roll revised, corrected and in force in the township of Albion, and while the said Wm. Switzer was such clerk, &c.*"

With this difference the second count is as in the first count down to the word *omit*, in place of which the second count has the word *insert*, and it then proceeds as follows: insert in the said certified list, last mentioned, the names Alexander Stewart, &c., which names, or any or either of them, ought not to have been inserted in the said last mentioned list, so that and thereby the said last mentioned list so certified and delivered to the said clerk of the peace, was not the correct list of all persons entitled to vote at any election aforesaid, according to the said assessment roll of the said township of Albion, as finally revised and corrected as aforesaid, against the form of the statute, &c.

William Switzer has demurred to the indictment, on which the Attorney-General has joined in demurrer.

Last Trinity Term *J. H. Cameron*, Q. C., for the demurrer, referred to ch. 6, of the Consolidated Statutes for Canada, sec. 20. The first count does not allege that the names omitted from the list were the names of persons "who were entitled to vote." Nor does the second count allege that the

names inserted were the names of persons "who were not entitled to vote." It is not alleged that the list was not made from the last assessment roll, but only that it was not made up from the assessment roll according to ch. 6 of the Consolidated Statutes for Canada. The inferential allegation, "so that and thereby the said list was not the correct list, &c.," will not cure the defect, and is not allowable in pleading, and it does not appear what the *said* list means, whether the original or the duplicate; the original may be correct, and it is not an offence to omit from or insert names in the duplicate list.

S. Richards, Q. C., for the Crown. The statute makes it an offence to omit from or insert names in *any certified* list, which applies equally to the original and to the duplicate, sec. 20, and when the returning officer is not the clerk of the municipality, he is to get, by section 48, a copy of the list from the clerk of the peace, from which it appears the duplicate which the clerk of the peace has, is as much within the protection of section 20 as the original list. The indictment does sufficiently show that the *said* list referred to is the duplicate or the duplicate original which was delivered to the clerk of the peace. The indictment is in the words of the statute, and it therefore does sufficiently appear that the names omitted and inserted were the names of persons who, in the first case, were entitled to vote, and in the last case were not entitled to vote at such legislative elections.

J. H. Cameron, Q. C., in reply. The only lists in respect of which a felony can be committed, are the original list and the duplicate to be delivered to the clerk of the peace.

ADAM WILSON, J.—Section 20 of the act referred to enacts "if the Clerk, Treasurer, or Secretary-Treasurer of any city or municipality, neglects to make the alphabetical list as required by section 11 of this act, (which section applies only to Lower Canada,) or in making out any certified list of persons entitled to vote at any election of a member to serve in the Legislative Council or Assembly, wilfully inserts or omits any name which ought not to have been inserted or omitted, or otherwise alters or falsifies the same so that it is not the correct list of all persons entitled to vote

according to the assessment roll as finally revised and corrected. And if any Clerk, Secretary, Treasurer, Returning-officer, Deputy Returning-officer, Registrar, Clerk of the Peace, or any other person whose duty it is to deliver copies or have the custody of any certified list of voters as aforesaid, wilfully makes any alteration omission or insertion, or in any way falsifies any such certified list or copy, every such person shall be deemed guilty of felony, &c.”

The first count charges that the defendant, after having made out the alphabetical list of persons entitled to vote, &c., made out a duplicate original of the said list, and certified by affirmation to the correctness of the said duplicate original of the said list, and delivered the same to the clerk of the peace so certified, and that in making out the said certified list *so delivered to the clerk of the peace* of persons entitled to vote, &c., the defendant did feloniously and wilfully omit from the *said* list the names of, &c., which names, or any or either ought not to have been omitted from the said list.

It appears from this very plainly, that the omission is charged to have been from the certified list which was delivered to the clerk of the peace, and this is a list, or “duplicate original,” as it is called in section 6, sub-section 2, which the clerk of the municipality is required to deliver and certify to the clerk of the peace. The identity of the list, both in the first and second counts, is, we think, sufficiently alleged.

It was then objected that it did not appear that the names of those who were omitted from, or inserted in the list, were such persons who were entitled to vote or were not entitled to vote according to the fact, and we think that the allegation that the defendant, “in making out the certified list of persons entitled to vote, omitted (or inserted) the names in question, which names ought not to have been omitted (or inserted) from the list, so that the list was not the correct list of all persons entitled to vote according to the assessment roll,” is not a direct and specific allegation “that these persons were entitled to vote;” but perhaps this may not have been necessary if it had appeared that such persons were named in the assessment roll, or in the alphabetical list as persons entitled

to vote, although not so entitled in point of fact, and it was further objected that it was not alleged the list was made up from the last revised assessment roll. We think it does appear that the assessment roll referred to is the assessment roll for the year 1863; all the allegations, although some of them are laid under a *videlicet*, are quite definite on this point. It is not, however, clearly alleged, that the alphabetical list was made up from this roll, by reference to the year expressly, or by reference to it as the then last revised assessment roll; it is said "that after the final revision and correction" of the said assessment roll, and while the defendant was clerk of the municipality, and before the first day of October, in the last mentioned year, to wit, on the 30th of May, of the last mentioned year, he did make an alphabetical list of persons entitled to vote, &c., and did then, and while he was such clerk, make such list as, and for a correct alphabetical list of all persons entitled to vote, &c. But we think it is nevertheless sufficiently stated that the list was made up for that year, and that the Crown would be bound to prove a list for 1863 at the trial. No other persons were then entitled to vote but those who were upon the list for that year, and the lists, both original and duplicate, are several times referred to as "the lists of persons who were entitled to vote at the election of a member of the legislative council and legislative assembly." We think this objection should not prevail. The second count is still less open to this objection than the first count.

So far we have disposed of the objections which were taken on the part of the defendant, but we think there is one of serious difficulty which also exists to the indictment somewhat similar to one of the exceptions which was raised by the defendant. The defendant objected that the record did not aver that the names which are stated to have been omitted from or inserted in the list, were the names of persons who were entitled to vote, or were not entitled to vote according to the allegations in the different counts; but we think that even this averment would not have been sufficient, because the Crown ought to have shewn explicitly how, and in what respect, these names should or should not have been on the list, by setting out that they were upon or were not upon the

assessment roll, (as the case may be,) or at any rate that they were or were not upon the alphabetical list.

If the complaint had been as to the alphabetical list, the indictment should have shown that the names were either contained in or were not contained in the roll, but as the complaint is as to the duplicate original list, it may have been sufficient to have averred that the names were upon or were not upon that list, for the statute makes it an offence wilfully to omit from or to insert names in *any* certified list, and the duplicate original is made up from the alphabetical list according to sec. 6, sub-sec. 2, in which case a wilful deviation in the duplicate from the original list might be sufficiently stated by showing that certain names were either in or were not in the original list, and that the duplicate was a wilful deviation from the same, although in this latter case it would be safer, and may perhaps be absolutely necessary, to go back to the assessment roll, as well when the duplicate as when the original list is complained of.

If the record should have shown that the names specified were or were not (as the case may be,) in the assessment roll, or in the alphabetical list, and we think it should, then does it so appear in this indictment.

It is alleged that the assessment roll was made up and finally revised, and that the defendant made an alphabetical list of persons entitled to vote, &c., and did make it for a correct list of all persons entitled to vote, and certified as to its correctness, and that he also made out a duplicate original of the said list, and did certify to its correctness, then the charge is that the defendant did feloniously and wilfully omit from the duplicate list certain names which ought not to have been omitted, so that and thereby the said list, so certified and delivered to the clerk of the peace, was not the correct list of all persons entitled to vote, &c., according to the said assessment roll as finally revised and corrected, from which nowhere appears that these names were on the assessment roll as persons entitled to vote, or on the alphabetical list, but simply that such names were omitted from the duplicate list, and for anything that appears to the contrary, they ought not to have been upon that list at all, for they ought not to have

been there if they were not in the alphabetical list at least, and perhaps also in the assessment roll as well; and we do not think that the conclusion, so that and thereby the said list was not the correct list, &c., according to the said assessment roll, is equivalent to an averment that the names referred to were in the assessment roll, and in the alphabetical list, or in the alphabetical list alone. The professed denial too of the duplicate not being a correct list, according to the assessment roll, may be no offence either, if it be really a duplicate of the original alphabetical list as we have before mentioned. We should think in framing an indictment of this kind it ought to appear that the names alleged to have been omitted in the lists, or in either of them, were inserted in the assessment roll as finally revised and corrected as the names of persons qualified and entitled to vote, certainly this must be so alleged if the complaint be for the omission in the alphabetical list, and perhaps too if the omission be from the duplicate list when it is complained of.

In this case the defect of allegation exists both as to the assessment roll and the alphabetical list, for in neither of them does it appear these names were contained which were omitted from or inserted in the duplicate, and we cannot say that the names were either omitted or inserted wrongfully, unless we know that these names were on the assessment roll or in the alphabetical list at any rate, from which the duplicate was taken. It is no answer that the indictment has followed the words of the statute, because the allegation, as it now stands, submits a question of law for the jury to determine, and it is not a universal rule that an offence may be described in an indictment in the words of the statute which has created it, for an indictment charging that the defendant falsely pretended certain facts, although in the very language of the statute was held defective, in error for not averring specifically that the pretences were false, calling them false pretences, was not deemed an assertion that the pretences were false. *R. v. Perrott*, 2 M. & S. 386; see also 1 Ch. Crim. Law, 228.

As the indictment is at present framed, how could the jury say that the names set out "ought or ought not to have been

omitted from the list?" because it is entirely a question of law, dependent upon the fact of the names being or not being upon the assessment roll, as assessed for, or in respect of real property for a certain amount as owner, tenant or occupant, as the case may be.

The jury can tell whether certain names are or are not upon the roll, and whether such persons are assessed as before stated; so they can tell whether such names are or are not on the alphabetical list, and whether they are or are not omitted from the duplicate list, but they cannot say whether such names ought or ought not to have been omitted from the list, because that is a question for the judge to determine when the facts are once ascertained. In this case the jury are not called upon to find facts at all, but to pronounce what the law is upon facts which are not set forth.

The rule of pleading is "that the charge must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of "guilty" or "not guilty" upon the premises delivered to them, and that the court may see such a definite crime that they may apply the punishment which the law prescribes." *Rex. v. Horne*, Cowp. 682, or as it is afterwards expressed, "the record must contain all facts and circumstances necessary to warrant the conclusion of the jury, and all facts and circumstances necessary for the information of the court to give their judgment upon the occasion." *Ibid*, 689.

We find these facts and circumstances wanting in this case. The objections we have adverted to apply equally to both counts of the indictment.

The judgment will be for the defendant.

Per cur.—Judgment for defendant.

HOBBS V. HALL.

Action against sheriff—False return—Misconduct by parting with possession of goods seized.

Action for not levying, although debtor had sufficiency of goods. Pleas—not guilty—also that debtor had not more goods than defendant had sold and returned. At the trial a verdict was found for the plaintiff for much less than he claimed. On motion for a new trial,

Held, that the defendant's statement to the insurance agent, that the goods, when seized, were worth \$6,000, and his declarations to the different creditors that their claims were small as compared with the value of the debtor's goods, were evidence of value against the defendant. That his placing a stranger as his agent in possession of the goods, with authority to sell them in the shop as theretofore, who gave no satisfactory evidence of such sales, and who lost or mislaid or neglected to preserve the books of account which would have explained all these transactions, made him responsible for the consequences of his agent's misconduct, and that the defendant was entitled to no advantage or consideration, because the books could not be or were not produced.

The declaration alleged, in the first count, that the plaintiff had recovered a judgment against William A. Scott for £758 8s., and sued out a *fi. fa.* against goods, and delivered it to the sheriff to be executed; that Scott had goods sufficient whereof the defendant could and might and ought to have levied the monies of which the defendant had notice. Yet the defendant did not levy the monies, but neglected to do so, and afterwards returned that he had seized of the goods of Scott to the amount of \$400, which remained in his hands unsold for want of buyers, and *nulla bona* as to the residue.

In the second count it is alleged, that after the return before mentioned, the plaintiff sued out a *ven. ex.* and *fi. fa.* against goods for the residue, and delivered the same to defendant; and that although the defendant made under this last writ £347 3s., and although there were goods of Scott whereof the defendant could and might and ought to have levied the whole of the monies directed to be made of which the defendant had notice, yet he did not nor would levy the same, but levied only a part, and returned that he had made £347 3s., and *nulla bona* as to the residue.

The defendant pleaded to the first breach of duty in the first count, not guilty; as to the second breach of duty in the same count, a traverse of Scott having more goods than to the amount the defendant had returned; and as to the second count, a traverse of Scott having more goods than to

the amount the defendant had sold and returned the proceeds, issue was joined.

The cause was tried at the last spring assizes held at Peterborough, before the Chief Justice of this court, when a verdict was found for the plaintiff, and \$377 97c. damages, to which was to be added the amount, if any, which the defendant may have charged above the legal fees on the execution, to be added to the verdict.

The facts seem to be, that the sheriff had a number of executions against the goods of Scott, six of which amounted to £347 6s. 9d., and were all before the plaintiff's writ. The goods sold for £776 13s.; from which, after deducting for fees, taxes and rent, £92 3s. 3d., there remained £684 9s. 9d., applicable to the different writs; and after deducting the above sum of £347 6s. 9d., there remained as applicable to the plaintiff's writ the sum of £337 3s.

The plaintiff contended the sheriff had taken more goods than he had accounted for. The defendant denied this; but he said the goods which he had taken he had valued at full price, while the sale which he was compelled to make was only at the rate of ten shillings in the pound; and if the goods had produced their full price, he would have had sufficient to have satisfied the plaintiff's claim. He endeavoured to make this appear in this manner: The above sum of £776 13s. was made up as follows:

Shop goods, proceeds at 10s. in the pound..	£399	12	6
Furniture.....	76	15	0
Farm stock	132	17	6
Sales made by McDonald, who was left by sheriff in shop to carry on business	167	8	0
	<hr/>		
	£776	13	0

And he says, if, instead of the above portion of the goods producing only, upon an actual sale, ten shillings in the pound, or £399 12s. 6d., they had produced what he had valued them at, the proceeds would have been £799 5s., which would have been sufficient, with the other items, to have paid the plaintiff in full.

The plaintiff adduced evidence that the sheriff had insured the shop goods at the time of his seizure in the sum of £1,500, while he had only accounted for £399 12s. 6d. and £167 8s. or £567 0s. 6d.; and that even if the above sum of £399 12s. 6d. be doubled, as the sheriff had contended, it would still make the total valuation of the shop goods only £966 13s., which still shows an enormous disparity between his own present valuation and his former valuation of £1,500, when he effected the insurance.

From these facts the plaintiff contended that although the insurance valuation may not be conclusive against the sheriff, yet this very great difference between that amount and every other account which the sheriff has given of the goods is sufficient to fix him with a much greater valuation than £567 0s. 6d., which is all he has in truth accounted for, or only about one-third of the amount for which he made the insurance; and that this fact, coupled with the sheriff's conduct in other respects—in granting indulgence to the debtor, in carrying on the business after seizure by McDonald, in not producing McDonald's sales account, and in delaying to enforce the creditors' claims, assuring them that the debtor had sufficient to pay everybody—were at any rate quite sufficient to have entitled the plaintiff to a verdict for the full amount of his demand against the sheriff.

The insurance agent was examined. He said he examined Scott's stock, and he asked McDonald, the book-keeper, about it, who said its value would then exceed £1,500, because stock had been taken shortly before then; and the agent said, from what he heard, he was satisfied, and took the risk for £1,500, on the 15th August, 1861, on behalf of two companies.

The deputy sheriff, on the part of the defence, said the sale was made in November, 1861; the seizure was in March, 1861. Scott's shop, after seizure, was open, the same as any other shop in the street. There was a person in possession of the goods at same time; could not say when.

McDonald said, on his examination: No goods were taken away but what were sold after sheriff took possession; he paid sheriff proceeds of all sales; can't say what the amount was; books would shew; can't say when the sheriff put him in

possession. The goods were valued before the sale by two good judges; he would not have given six shillings and three pence in the pound for them; thinks it all the goods were worth, either in July or November.

In Easter term last, *H. Cameron* obtained a rule on the defendant to shew cause why a new trial should not be granted, on the ground that the verdict was perverse and against the evidence, which shewed clearly that there were sufficient goods of the execution debtor in the hands of the defendant to have satisfied the plaintiff's execution, and on grounds disclosed in affidavits filed.

These affidavits were to this effect: The plaintiff swore that at the examination of the execution debtor, last spring, before the judge of the County Court, he tried to get from the debtor the stock book and sales book of the debtor; that such books were promised to be produced, and were ordered to be produced by the judge, but they were not produced; that Scott informed the deponent that he had searched for them, and had spoken to McDonald about them; that he could not find them, and he was under the impression that the defendant had them, as Scott had not seen them since the sale by the sheriff; that the defendant said, when the jury in the case were out considering their verdict, that McDonald had retained possession of these books, and he the defendant had never been able to get a sight of them, although he had used every endeavour to obtain it; that large quantities of goods, he had been informed, were, while McDonald was in possession for the defendant, sold on credit, and the proceeds not received by or accounted for to the defendant; and the sales book, if produced, would show the amount of such sales; that the venue was changed from Cornwall to Peterborough; that the defendant has great influence there, and the deponent believes he cannot procure a fair trial.

The plaintiff, on the return of the rule, filed an affidavit, that the application for insurance in one of the offices, made by the defendant, was in the defendant's handwriting, where it is written except the words "W. A. Scott."

The application is for an insurance to the extent of \$3,000 for three months on the goods in question, which it describes

as about "the value of \$8,000," and the yearly average of the debtor's goods to be about \$10,000.

The defendant also filed affidavits. His own affidavit stated that his custom was to insure goods he had seized for the full amount of the writ; that in this manner, not being aware of the value of the goods, he insured them for £1,500; that by the valuation they turned out to be not worth more than £800.

McDonald made affidavit, that the sales book and stock book were in his possession after the sale; he considered them valueless, and left them in the debtor's store for many months; that these books were casually lost, and he cannot now find them; and he has no recollection of having seen either of these books since 1861.

This deponent also made another affidavit respecting the account of the sales on credit, to the same effect as his evidence at the trial.

The rule was argued last Trinity term, by *Read*, Q. C., for defendant, who cited *Hyde v. Gooderham*, 6 U. C. C. P. 539; *Lizars v. Farrel*, same vol. 276.

H. Cameron, contra, cited *Jones v. McDowell*, 12 U. C. Q. B. 214; *Hudson v. Marjoribanks*, 1 Bing. 393.

A. WILSON, J.—The whole question is, what was the value of the goods of W. A. Scott, which the defendant seized under the different executions, including the plaintiff's writ, which were placed in his hands?

The defendant insured them for \$6,000, on the 15th August, 1861. He states their value, under his own hand, to be "about \$8,000." On the 5th October, of the same year, in one of his letters to the plaintiff's attorney, produced at the trial, he wrote, "In the case of Scott, I have been unwilling to sell, as I know he has a very large amount due him; and his stock of goods, in comparison to the claims I have against him, is very small, and by selling him now, some of his creditors would surely suffer."

There is evidence, notwithstanding this, that the goods were not worth nearly the amount, and that they were not worth more than six shillings and three pence in the pound, valued only at

£800. But this is the evidence of McDonald, (who, from what he told, the insurance agent insured for \$6,000,) who was left in possession of the goods and shop by the sheriff, to carry on business for some months; who made all the sales; who could not tell what he sold; who remained in possession of the goods after Robert Scott became the purchaser, and who is there now as the owner; who had the possession of the stock book and sales book after the sheriff had sold, and which, if produced, would clear up all the uncertainty and difficulty; and who, although it is sworn that the sheriff stated that he (McDonald) had retained possession of these books, and he (the sheriff) had never been able to get a sight of them, although he had used every endeavour to get such a sight, has not afforded any answer to this statement; and therefore it would seem to be such testimony that cannot apparently be very strongly relied upon.

But McDonald's mismanagement, if there was any, or his carelessness in mislaying or losing these books, if he can be charged with it, we have nothing to do with in this action, as any personal complaint or imputation upon him. He was there as the defendant's agent, and the defendant must be answerable for all his conduct, and for the consequences of it. He was placed in charge by the sheriff, apparently without restraint, to do as he liked, for Blaine, the sheriff's own officer, was in possession only for some few days before the final sale in November.

We think that under these circumstances it was not for the sheriff to get the benefit of the absence of these books. On the contrary, he ought to have been held very rigidly to his own application for insurance, and to his own subsequent written declaration that the claims against the debtor were very small in comparison to the debts due to him, and to his stock of goods; and the non-production of the books should have been an additional ground of suspicion against him on this occasion.

We have no doubt that if the goods had been destroyed by fire, the defendant could have furnished abundant testimony that the value of the goods was as great as the amount they were insured for, and that the insurance companies would

have been compelled to pay the whole of the \$6,000, and not only £567 0s. 6d.; and we have as little doubt that the jury have failed to give the case its full and just consideration.

It is not to be permitted to sheriffs to play fast and loose in this manner; to bestow all their natural sympathy, beyond the line of their duty, upon the debtor, and to exercise all their official rigour, not warranted by their duty, against the creditor; to give over so unreservedly to another the pledge which the law declares shall remain in their own hands; and when that other possibly has abused his trust, to claim exemption from all accountability, because they have only neglected their duty, and have only enabled another to do the wrong which is complained of without having done it themselves, and possibly without having been gainers by the wrong which has been done,—that they have enabled another, by very great and irregular powers which they have conferred upon him entirely against the interests of the creditors, and at variance with the directions of the court, to do the mischief, can be no excuse in law, and should be none in fact; and so far as we can pronounce against it, it must not be an excuse if we can correct it.

There will therefore be a new trial without costs.

Per cur.—Rule absolute.

STEWART V. ROWLANDS.

Libel for a newspaper publication—Plea of justification—Demurrer.

This was an action of libel. The matter relied upon as libellous was that the plaintiff “has for the past twelve months made his paper a *receptacle for coarse abuse, scurrilous personalities*, and, in some cases, *gross slanders on private individuals* who happened to come within the pale of his displeasure.” That “he has dragged into print *in the most offensive manner the names of some of our most respectable and philanthropic citizens*, invaded the privacy of their personal relations, and held their peculiarities up to ridicule, and has, by heaping unmerited abuse on some of our most valued institutions, endeavored to turn them into a bye-word and a *laughing stock*.”* “There is no doubt a generous impulse in our nature * * * but it is surely carrying such an impulse a great deal too far * * * if we so far lose the sense of his moral turpitude as to elevate into an oppressed hero the man who is suffering the merited consequences of a long course of *deliberate, determined and reckless wickedness*.”

Pleas, (1) Not guilty. (2) Justification; setting out articles from the newspaper published by the plaintiff 12 months previous to the publication by

the defendant of the communication complained of, and alleging that the said matters published by the plaintiff were false and malicious, and that the persons so libelled were persons of good name, &c.

Demurrer to the plea of justification, on the grounds, among others, (1) That the defendant having charged the plaintiff with "moral turpitude," &c., was seeking to evade the libel by stating circumstances forming no justification. (2) That if the plea justified any part of the libel, it only justified down to the (*) asterisk, whereas the plea is pleaded to the whole libel. (3) That the plea is multifarious.

Held, that *primâ facie* the articles set forth in the pleas afforded a justification for the alleged libel; that by one of the grounds of objection, the plaintiff admits that the defendant has justified down to the asterisk (*); that the plaintiff having admitted to have done what is alleged, has no ground of complaint because others say that he possesses "*moral turpitude*," and that his course has been one of "*deliberate, determined and reckless wickedness*;" that the having spoken of the gentleman therein mentioned by a nick name and having ridiculed his religion, would seem to indicate a malicious feeling; that having called another gentleman a "manikin," and having made allusion to other personal defects was an indication of deep seated malice; that the reference to a person who had given a large sum of money to a benevolent institution, could only arise from wanton or reckless feelings; that the reference in articles 5, 6, and 7, gross terms, to a gentleman's lameness and manner, and also to his appetite, could only have been influenced by bitter and malignant feelings; that if any series of attacks on individuals could justify the charge of "*moral turpitude*," and *deliberate, determined and reckless wickedness*, these did; that the justification, as stated was a sufficient answer to the charge.

Held, further, that in accordance with the decision of *Brown v. Beaty*, 12 U. C. C. P. 107, the plea was not bad on the ground of multifariousness.

This was an action of libel against the defendant, the publisher of a newspaper called the "Daily News," for having inserted in it a communication, the following words of which communication the plaintiff relied upon as libellous:

"It is only too well known that the editor of the "Argus" (plaintiff) has for the past twelve months conducted his paper in such a manner as to call forth the strongest disapproval of a right feeling public, completely perverting the use of a public journal. * * * He has made his paper a *receptacle for coarse abuse, scurrilous personalities*, and in some cases *gross slanders on private individuals* who happened to come within the pale of his displeasure. For no other reason than that they voluntarily or involuntarily crossed his path or interfered with his projects, he has dragged into print, *in the most offensive manner, the names of some of our most quiet, respected, and philanthropic citizens, invaded the privacy of their personal relations, and held their peculiarities up to ridicule*, and has, by heaping the most *unmerited abuse* on some of our most *valued institutions*, endeavoured to turn

them into a by-word *and a laughing stock*. * * * Is a man to be suffered, in a civilized community, to go on month after month scattering moral firebrands around him without meeting some severe check." (*)

"There is no doubt a generous impulse in our nature, leading us to sympathise with the sufferer even when a guilty one, but it is surely carrying such an impulse a great deal too far, discrediting our moral sense as a community, and doing a real injury to the individual in question, if we so far lose the sense of his *moral turpitude* (meaning thereby the *inherent baseness* and *extreme depravity* of the plaintiff,) as to elevate into an oppressed hero the man (meaning thereby the plaintiff) who is suffering the merited consequences of a long course of *deliberate, determined, and reckless wickedness*," (meaning thereby that the plaintiff had pursued a long course of deliberate, determined and reckless wickedness.)

The defendant pleaded first, not guilty, and second, justification—setting out articles from the newspaper of plaintiff, published within twelve months next previous to the publication complained of, each of which articles contain certain scandalous matter.

Articles set out in the plea of justification, which were published in plaintiff's newspaper the "Argus":

No. 1.—Article in the "Argus" dated 12th February, 1862, in referring to "Dr. ———, a professor in Queen's College.

"Thus was Mike. * * Yet the *creature* now tells the trustees of Queen's College, that if they do not twist the nose of the man who created him, he will divest the university of his astonishing intellect and education. What must our friends here think of Mike. It is well known to them that when Mike was appointed he was at the point of *medical starvation*. * * A *meek* christian is *Mike*. He is starving—bread is offered to him—he eats—his belly is filled—he turns and *bites the hand that fed him*—*grateful disciple of the great John Wesley*."

No. 2.—In the "Argus" of 26th March, 1862, referring to Dr. ———.

"The article was written in Kingston and sent to the *drunken and malignant fellow* who edits the ——— Medical Journal, and discourses on midwifery in ——— College. We say *drunken*, because that was ———'s character a year ago, and we say *malignant* because we shall shew that is his character now. We look upon the contents of ———'s cranium as a *puddle of alcohol* and cerebral substances."

No. 3.—In the "Argus," dated 23rd April, referring to Dr. ———, professor of anatomy, Q. C.

"*The Anatomical Chair.*"—"At a meeting of trustees a Dr. ———, a practitioner who had been starved out of ———, (a small village,) was appointed to the anatomical chair of the college, vacant by the stupidity and dishonesty of the trustees. The chair had been sent round a begging * * * * until the aforesaid village medico rashly jumped into it. Who put into the noddle of the ——— manikin, a notion of the chair, we are at a loss to know, certainly none of the medical faculty. There is not brains among them sufficient to get up a joke. There must have been some extra medical faculty wag at the business. The late occupant (plaintiff) was six feet two and a half *sans* boots, the present *three feet one with boots*, a much littler baby certainly, to come after the old coon. We can imagine the grin of the students, should there be any, when *baby stands up* at the anatomical table. But is not this guid gear rowed up in little bundles? Yes, sometimes. In the *present case the mind must be measured by the body*. What the trustees should have done was to have invited to accept the chair, a man who could have commanded respect by his devotion and professional ability, by offering a respectable salary. ———, who is paid far beyond his ability, might have been made to divide his salary with that of the anatomical professor. In this way a person of talent, education and energy, might have been induced to accept. What intelligent parent would send his son to listen to ——— drawling extracts on chemistry, or ——— sputterings on surgery, or ——— charlatan gabblings on physic, or ——— stupid lucubrations on drugs, or *Mike's* ignorant display of midwifery."

No. 4.—In the “Argus,” dated 11th June.

“*Emergent meetings.*” — “We observe by the advertisement that emergent meetings have been called by the salt beef and mustard craft, for the purpose of laying the corner stone of the — wing of the Kingston General Hospital. It appears to our uninitiated self, that this is a very great cry about a very little wool. * * No emergencies exist in this hospital business, as — by being more lucky than wise, had nothing to do but put his hand in one of his potash kettles and extract a thousand pound note. What a fuss the servile world makes about a man who accidentally has a little filthy lucre that he must leave behind him when his time comes to be laid amongst his brother worms.”

No. 5.—In the “Argus,” dated 5th June.

“Janus (meaning the said —) has fine times, better than persons more deserving. All that he has done, that we are aware of, since he came to Canada, is to hob-nob with old women and good fellows. * * The first principal was the very opposite in character to the present. He was a man of great attainments and knowledge of the world, a perfect gentleman, expressing himself freely on subjects and sincere in his expression of opinion. * * In Doctor L’s stead the college now has a person, (meaning —,) comparatively of *no intellect, who seldom appears to know what he is doing*, and when he has any act in contemplation, performing it *with a cunning unworthy* of the position he holds. The designation of *Janus* is not a nickname given him by us, but one he has earned for himself by his insincere communications with the professors and students. A very correct likeness of him, with two faces, having formed an ornament to the walls of the college session. We trust that *Janus*, when he arrives in Scotland, will straddle a comet, as he did last year, and that the said comet will be attracted into the maw of old Sol, *and thus Canada be relieved of a very great humbug.*”

No. 6.—In the “Argus,” dated 15th October, 1862.

“Great success has attended —’s labour at Queen’s College, by a man as *morally crooked as his fleshy body is naturally deformed*, — *is comparatively a vulgar man*, without either *mind or scholarship*, whose God is *mammon.*”

No. 7.—In the “Argus,” dated 29th October.

“By this time we suppose the belly-wise Calvinistic doctor of Divinity is on the ocean returning to Canada to take home to Scotland another £500. We mentally see him hopping around amongst the passengers, boring them with questions, and enlightening them with his *ah*. We can watch his stomach through the fat walls of his abdomen, gradually filling at dinner, and can hear him after that meal, while lying on his couch, oppressed with gastronomic indulgence, thus giving vent to his feelings, under pretence of studying science and advancing the interest of the church of Scotland, he has in reality nothing in view *but his belly*, all his wisdom is directed *to the gratification of this organ*. Twenty-four months has this *imposter* in science been principal of — college. * * Twelve hundred dollars *has this fellow* received of the hard earnings of the people.”

No. 8.—In the “Argus,” dated 29th October.

“—— —. We well recollect the *obsequious, sanctified looking fellow* who first entered Kingston with a nicely painted goose quill stuck behind his ear. Had we extended to him one of our lengthy lower extremities, and intimated to him to *lick from the surface of the boot the dust which had accumulated, the parvenueau* would at once *have complied* with our demand. * * Some five or six years ago the *saint* married. The said —, formed a matrimonial alliance through which he was stuck in as secretary of the trustees. He proved to be as great a *nuisance* as he was in the Trust and Loan Company, * * and the trustees must recollect how we *snubbed the impudent fellow* before them two years ago.”

No. 9.—In the “Argus,” dated 5th March, 1863.

“—— — was a soldier in the 79th regiment while in Dingwall, Scotland. Instead of devoting his time to literary pursuits, he occupied it by becoming *the keeper of an obscene pugilistic establishment*, wherein the Dingwall bumpkins were instructed in the art of *blackening each others visual organs*.”

No. 10.—In the “Argus,” dated 8th October, 1862.

“This was followed by an attempt at lecture by a little body of the name of —, not on *musk rats*, of which he had some knowledge, * * but on what does the reader think, the

science of medicine. We have from an educated person present, there were *not two grammatical sentences* in the little village sawbones' production. He is but a specimen of the medical department of Queen's College, in which there is not a *single individual who has received an ordinary literary education*. What an imposition is this collection of ignorant pretenders to medical literature upon the youth of the province."

No. 11.—In the "Argus," dated 3rd December, 1862.

For the publication of which he was indicted for a libel at the Quarter Sessions for the United Counties of Frontenac, Lennox and Addington, and convicted.

"Of all of those whose names appear as taking a prominent part in the vestry meetings, we know of none more likely to originate, *to propagate* and to glorify over *a scandal* than Palmer's apothecary boy. * * Just imagine a Kingston scandal not known in *Y—s' establishment*. * * Neither rumors nor scandal however, hath tainted the *pure domestic atmosphere* which Y — breathes, *credeat judæus, let the moles believe it*."

No. 12.—Article of 10th December also included in indictment on which defendant was convicted.

"And Y — was sent to Kingston to amuse himself in performing equestrian feats upon the backs of numerous pigs which then frequented the market place. From the back of the pig to Palmer's drug counter, to a New York doctorship was the second, and from the doctorship to a four cornered hat with two tassels, placed upon him by myself (meaning plaintiff,) was the third. * * Y— has never had an opportunity of having impressed upon his mind any higher sense of honor than he has displayed in this case. His ignorance of the feelings of a gentleman is his bliss."

No. 13.—In the "Argus," dated 10th December, 1862.

"Just imagine a conservative journal under the auspices of such an unprincipled fellow as ——. * * A journal which would advocate *lying, drunkenness and adultery*, would be more in —s line, judging him by his antecedents. We would as soon think of making a discharged robber and murderer president of the Bank of Upper Canada, as of placing a con-

servative journal under the auspices of a low, unprincipled, and *slandrous* fellow like ——."

The plea then concludes that the said libellous matters respectively published by the plaintiff were false and malicious, and the said persons so respectively, falsely and maliciously libelled by the plaintiff, were persons of good name and reputation, and of good standing in society, and loyal subjects of her Majesty, and the said University of Queen's College, was then, and still is, a distinguished place of learning, where the arts and sciences are reputed to be well taught; wherefore, for the reasons above respectively set forth, the defendant published the said alleged libellous matter in the declaration mentioned, as he lawfully might for the cause aforesaid.

The plaintiff demurred to the plea of justification, and stated the following matters to be argued:

1st. The defendant having charged the plaintiff with moral turpitude, and with having pursued a long course of deliberate, determined and reckless wickedness, was attempting to evade the charge by stating circumstances which form no justification of the libel.

2nd. That if the matters alleged in the plea justify any part of the libel, they only justify so much as is contained between the words "the recent libel case," and the words "some severe check" inclusive, whereas all of the said matters are pleaded in justification of the whole of the libel.

3rd. That the libel complained of expresses an opinion of and contains charges against the plaintiff's conduct and character, and that the defendant does not disclose any sufficient grounds for such opinion or charges.

4th. That the plea avers that the plaintiff falsely and maliciously published various matters, the publication whereof is alleged as justification of the libel complained of, but does not aver that the said plaintiff so published the said matters, knowing them to be false, and that without such additional and direct averment, the statements in question, in the plea, do not justify the libel.

5th. The averments in the plea are not co-extensive with the libel.

6th. That the said plea is multifarious.

7th. That the plea shews plaintiff published the matters in his public capacity as an editor, and of certain individuals occupying public positions or performing public acts, but does not shew or aver that the said matters were not within the privilege of public criticism.

During Trinity Term last *McLennan*, in support of the demurrer, contended that the justification was insufficient, because it did not answer the whole of the libel ; that plaintiff is described as a moral firebrand, and nothing in the justification tends to prove that. Then he is charged with moral turpitude, and deliberate wickedness ; that nothing set forth in the plea warrants that inference ; that moral turpitude meant utterly base, inherent baseness. He referred to *Wakley v. Cooke*, 4 Ex. 511, as shewing that where it was charged as a libel that plaintiff was a libellous journalist, and the justification proven was that an action had been brought against him for libelling one R. C. in his profession, in which action £100 damages had been recovered, it was held that the plea justifying the word "libellous journalist," imputed moral misconduct, and the production of the record referred to without further evidence did not prove the plea. He contended in this case the imputation of moral misconduct was clear, and therefore the demurrer ought to be sustained. He also referred to *Gibb v. Shaw*, 18 U. C. Q. B. 165.

S. Richards, Q. C., in support of the plea. The whole article set out in the libel shewed that the writer was commenting on and criticising plaintiff's conduct as the editor of a public journal. He contended that the libels published by the defendant, and set out in the plea, justified every word that was written in the article complained of ; that the case in 4 Ex., referred to by *Mr. McLennan*, was in favor of the defendant, for the judges there say, in speaking of the plea, it does not mean the plaintiff had been guilty on one occasion only of having merely published a libel, but that he has been guilty of gross misconduct as a journalist by the *habit* of libelling others. The publication of a libel which may make a man civilly liable, does not necessarily lead to the conclusion that he has been guilty of any moral misconduct. He also

contended the observations of the court in *Gibb v. Shaw*, as well as in *Fellowes v. Hunter*, 20 U. C. Q. B. 382, were in favor of the defendant.

RICHARDS, C. J.—It does not appear to me to require more than the reading of the articles set forth in the plea of justification, extracted from the plaintiffs journal, to lead to the conclusion that *prima facie* they afford a justification for the alleged libel set out in the declaration. They do seem to teem with coarse and abusive personalities, and gross slanders, on private individuals. The names of persons are dragged into print in a manner which appears very offensive. The privacy of personal relations seems to be invaded, and the plaintiff apparently labours to turn the college referred to, and its professors, into ridicule. In one of the grounds of objection taken to the plea, it seems to be admitted that the defendant has justified all down to the asterisk, if so, it appears to me what follows may be easily justified. The man who admits that he has done what is there alleged of him, ought not to complain if others say it shews that he possesses *moral turpitude*, and that his course has been one of deliberate, determined and reckless wickedness.

Taking up the articles by their number, the first item reproaches a professor in the college with having been at the point of medical starvation. He is spoken of by a nick name and his religion is, to a certain extent, ridiculed, he is called a “meek christian is Mike.” “He bites the hand that fed him—grateful disciple of John Wesley.” This would seem to indicate malicious feelings toward this gentleman.

No. 2. Another medical gentleman is spoken of as a drunken, malignant fellow. “We look upon his cranium as a puddle of alcohol cereberal substances.”

No. 3. Another medical professor is referred to as having been starved out of a small village. He is called a manikin because he is a small man, is spoken of as only being three feet one inch high, and that his mind must be measured by his body. The allusion to personal defects and deformities has always been considered as unwarrantable, and as indicative of deep seated malice.

In the concluding part of the same article the observations on the different professors is calculated to injure the college.

No. 4. The reference to a gentleman who had given a large sum of money to a benevolent purpose would seem to be very ungracious, to say the least of it, and could only arise from wanton or reckless feelings.

The reference in articles 5, 6 and 7, to a reverend gentleman, the principal of the college, and a doctor of Divinity, seems very repulsive.

In No. 5 he is spoken of as a person of comparatively no intellect, who seldom appears to know what he is doing; as having the name of Janus, and in reference to his departure to another sphere, says that Canada will be relieved of a very great humbug. This gentleman was somewhat deformed, and in No. 6 he is referred to as a man as morally crooked as his fleshy body is naturally deformed; as comparatively a vulgar man, without either mind or scholarship, whose God is mammon. The allusions to this gentleman in No. 7 are still more gross, not only referring to his lameness but to his manner of speaking. He refers in gross terms to his appetite for eating, his having in reality nothing in view but his *belly*, all his wisdom directed to the gratification of this one organ. No one can read these three articles without being satisfied that the man who wrote them must have been influenced by very bitter and malignant feelings towards the man of whom they were written.

No. 8 appears to be a reckless attack on a gentleman who is described as one who would lick the dust from his feet. That he was a nuisance, and a fellow whom he had snubbed.

No. 9 is also an attack on another gentleman.

No. 10 seems to be an attack on the college, gross enough.

No. 11 is an indication of the recklessness with which reference is made to the privacy of a man's home.

No. 12, a gross personal attack on the gentlemen ruthlessly assailed in No. 11.

No. 13 is also of a very gross character.

In conclusion I must say, that if any series of attacks upon persons and individuals could ever justify the charge that the writer or publisher of them was guilty of moral turpitude and

deliberate, determined and reckless wickedness, these attacks fully justify that language. What can be more base and wicked than to ridicule a man for his natural defects, such as lameness or the smallness of his size? And is he to be attacked, week after week, in a newspaper for these natural defects? What right has the editor of a public newspaper to make observations as to how much food a man eats or how he digests it, or what right has he to assert that scandals are bred in a man's house? The sacredness of a man's home has almost invariably been respected in the worst of times, and a generous mind is the last to tolerate a reference to personal deformities for which the sufferer is in no way personally responsible. He who resorts to those means of attack must not complain if others assert he has a bad, depraved heart, and that his course is one of deliberate, determined wickedness.

I think the justification, as it now stands, is a sufficient answer to the charge. The legal point suggested by the reference to the case in the Exchequer was answered in the argument by Mr. Richards.

The objection that the plea is multifarious is answered by the decision of the question in *Brown v. Beatty*, 12 U. C. C. P. 107, where a similar plea was ruled good.

I think there should be judgment for the defendant on the demurrer.

Per cur.—Judgment for defendant on demurrer.

NOTE.—See *Tighe v. Cooper*, 7 E. & B. 639.

HARDEN V. BANK OF TORONTO.

Interpleader issue—Rejection of evidence—New trial.

On the trial of an interpleader issue, the defendants offered in evidence a letter from the judgment debtor to them, which was rejected.

On motion for a new trial for the improper rejection of evidence,

Held, that as it appeared from the evidence that the plaintiff allowed the judgment debtor to make other declarations with respect to the property, it might be presumed that he permitted him to make those contained in the letter which was offered in evidence and rejected; that there being such a foundation laid at the trial as shewed *prima facie* a joint interest or an interest of some kind between the plaintiff and the judgment debtor with regard to the goods in question, that therefore the letter was admissible as evidence.

This was an interpleader to try whether certain goods seized in execution by the sheriff of Northumberland and

Durham, as the goods of Zadoc J. Harnden, at the suit of the defendants, under a *fi. fa.*, delivered to the sheriff on the 11th November, 1861, were at the time of the seizure the property of the plaintiff, Charles Wesley Harnden, as against the defendants.

The trial took place at the last spring assizes, held at Cobourg, before the Chief Justice of this Court, when a verdict was rendered for the plaintiff.

In Easter term last, *C. S. Patterson* obtained a rule on the plaintiff to shew cause why a new trial should not be had between the parties, on the ground of the improper rejection by the learned Chief Justice of a letter offered in evidence, written by Zadoc Harnden, the execution debtor, to the defendants; and on the ground that the verdict was contrary to law and evidence, and to the weight of evidence, the evidence having shewn that the property in question was in truth liable to seizure as the property of Zadoc Harnden.

The evidence was very lengthy, and was to the effect, on behalf of the plaintiff, that the property was his; while, on the part of the defendants, it was that the goods were the property of the execution debtor, who is the father of the plaintiff; and that the transfer of it was made from the father to the son, while the former was in difficulty, and for the purpose of defeating his creditors; and that he continued after the transfer to manage the same as fully as he had done before making it.

In the course of the trial a letter, dated 31st March, 1863, from the execution debtor to the manager of the defendants' bank in Cobourg, was tendered in evidence by the defendants' counsel, but was not admitted by the learned Chief Justice.

It was the rejection of this letter which is complained of in the defendants' rule.

The charge to the jury was, that when a father becomes insolvent, and his son succeeds to his business, such transfer is as a general rule, to be viewed with suspicion; and when the father himself, who could explain the transaction, is not produced, and there is no reason to suppose he is unfriendly to his son, such absence is open to comment against the claim of his son. But it is a question of fact for the jury, whether

the business was really the father's or not : if the father's, to find for the defendants; or if any part of the goods seized was the property of the father, to find for the defendants for that portion of it: but if the jury believed that the lumber and logs were the property of the plaintiff, to find for him as to all that was his.

The finding was thereupon for the plaintiff generally.

In Trinity term last, *Jellett*, for the plaintiff, shewed cause, and contended that it was entirely a question for the jury, and the evidence sustained the finding; that this was the second trial, the first time the jury not having agreed; that the letter of the plaintiff's father, which was excluded at the trial, was not admissible against the plaintiff, and there was therefore no ground for the objection that evidence had been improperly rejected. *Taylor on Ev.* 4th ed. 646; *Hurrell v. Simpson*, 22 U. C. Q. B. 65; *The Queen v. Chubbs*, 14 U. C. C. P. 32; *Grey v. Dayfoot*, 7 U. C. C. P. 156.

C. S. Patterson, contra. The letter in question was admissible in evidence; for it appeared the father and the son were both dealing with the property in question. *Willies v. Farley*, 3 C. & P. 395.

A. WILSON, J.—Unless the Chief Justice excluded the letter referred to when he ought to have admitted it, we shall not be able to disturb the verdict; for on all other points the case went fairly to the jury, and with such a charge as put the issue before them as favourably for the defendants as it could have been; and although that finding may not be quite satisfactory to us, we do not think there is any sufficient ground upon which it can be reopened.

The only question, then, is, as to the admissibility of the letter. The letter is dated 31st March, 1863, and is signed by Zadoc Harnden, and addressed to Mr. Leach, the manager of the Bank of Toronto in Cobourg. The writer says :

“Dear Sir,—I would be very glad to have you not to make any cost on the Newcombs, as it would be the means of putting me in a bad shape, and would not be benefiting the bank any; and as I am very busy getting logs in to the Dumble mill, I

do not want to spend time to come to Cobourg to see you about it whilst the snow lasts, as it would be a loss in getting the work along for me to come. You will please let the matter rest until I come up, as I will be there this week some day, and let you know how matters stand, and possibly it might be a benefit to you. I have six teams drawing, besides what I am buying. You would do me a favour by sending me the other hundred dollars as soon as possible, as I stand in need of it for to pay for logs, and to assist in getting in what I am drawing with my own teams. You will please enclose it to Codrington, and much oblige

“Your most obedient servant,

“Z. J. HARDEN.”

The rule, as stated in Taylor on Evidence (646), is as follows: “An *apparent joint interest* is obviously *insufficient* to render the admissions of one party receivable against his companions, *where the reality of that interest is the point in controversy*. A foundation must first be laid by shewing *prima facie* that a joint interest exists.” And several cases are referred to: Catt v. Howard (3 Starkie, 3), where, in an action for money had and received, the declarations of one Gibbs, who had entered into partnership with the defendant, were held not to be admissible against the defendant of a transaction antecedent to the partnership, “unless a foundation were first laid by shewing that they were jointly responsible, and that it would be going too far to presume a joint liability.” Nicholls v. Dowding (1 Stark, 81): When *prima facie* evidence of the partnership of the defendants was given, Lord Ellenborough, C. J., allowed the declarations of the one defendant to be given to bind the other, saying, that the evidence was analogous to that of conspiracy, where, after a foundation had been laid, that which is said by one may be given in evidence against the rest.

Does it appear, then, in the present case, that a foundation was laid at the trial, by shewing *prima facie* that a joint interest of some kind did exist between Zadoc Harden and the plaintiff, the father and son, as to these goods? If it does so appear then the letter should have been admitted; if not, the ruling was correct.

The case in 3 C. & P. 395, is relied upon by the defendants as shewing the extent of the evidence which ought to be held to be sufficient to let in the letter of the father. In that case it appeared that Edward Willies got a bill of sale of the goods of John Willies, made to him by the sheriff, under an execution. John Willies, the debtor, remained in possession of the goods; the sheriff afterwards took the same goods upon an execution in favour of Messrs. Homfray. An action was brought by Edward Willies for such seizure. The defence intended to be set up was, that Edward Willies' execution was merely colourable. To shew this, the defendant's counsel wished to ask the sheriff's officer what John Willies said when Messrs. Homfray's execution went in. It was objected that what John Willies said as to the property of the goods was not evidence, as he might be called. Vaughan, B., ruled that "What John Willies said as to whose the goods were, he being then in possession of the goods, is evidence."

I do not find this case cited in the last edition of Taylor on Evidence, but it is referred to in the 10th edition of Roscoe's N. P. (825), as being an active decision.

Upon referring to the evidence, it appears that Zadoc Harnden had formerly rented the Dumble mill; that John Campbell made an agreement with the landlord to get a lease of it when Zadoc's time was out; that Zadoc found fault with Campbell for taking the mill, and accordingly Campbell gave it up, and he gave a letter to Zadoc to that effect; that afterwards a lease was drawn to the plaintiff of the mill, dated 26th November, 1862, and before Zadoc's term had fully expired; that the plaintiff then lived with his father, while the logs were being got out, and up to the present time, as I understand, or until very lately; that the sawyer at the Dumble mill, who had been there for the last four years, never heard that the plaintiff had anything to do with the mill till July, 1863; that when the sawyer wanted money, he got it from Zadoc if he was at home, and if not, then from the plaintiff; that Zadoc continued to be about the mill, as he had been, though he did not give orders as he had usually done; that Zadoc said at the trial before the magistrate, respecting the cutting of some of those saw logs on other lands, in presence

of the plaintiff, that the costs of the trial would come out of him ; that he wanted to appeal from the magistrate's decision ; that he directed, equally with the plaintiff, that some lumber should be given to settle with the complainant for the trespass ; that the plaintiff attended generally to the farm, and the father to the other business ; that in the fall of 1862, the father agreed with Mr. Davidson for the purchase of logs, and they were hauled that winter ; that the father agreed with the same witness, in December 1862, or January 1863, to saw logs on shares. William Duncan speaks to about the same effect as the last witness : that Zadoc and the plaintiff were present when Martin measured the lumber for the sheriff, but the plaintiff did not have much to say about it ; Zadoc got warm about the mode of measurement, because Martin would not take bondsmen for the lumber, as Zadoc insisted he should do ; that Zadoc continued to get discounts for the defendant's accounts to the 17th March, 1863, and the Bank never heard of any change in his business. Evidence also was given that the lots off which the logs were taken from which the lumber was made, had belonged to Zadoc, and had been transferred to the plaintiff ; and it was clearly shewn that before the lease of the mill to the plaintiff, in November 1862, Zadoc was in difficulty, and that in February 1863 he tried to get a discount from the defendants to stock the Dumble mill so leased to his son with logs.

From all this it would seem that Zadoc, who was the lessee of the Dumble mill before November 1862, and owned some lands, and carried on a good deal of business, fell into difficulty, and made everything over to his son, who lived with him ; and that the father continued as much or nearly as much, after that transfer of the property as before it, to attend to it and manage it, buying and bargaining for logs, and raising or attempting to raise money to carry on the business ; and that much of this control over the affairs was exercised in the presence of the plaintiff, and not dissented from by him. And as the son permitted the father to make other declarations to the like effect with respect to this property, it may well be presumed that he permitted him to make the statements which are contained in the letter.

Was there not then such a foundation laid at the trial as shewed *prima facie* a joint interest, or an interest of some kind, between Zadoc and the plaintiff as to these goods?

It appears to us, on consideration, there was, and therefore that the letter was admissible, and that there should be a new trial.

Per cur.—Rule absolute for new trial.

DATE V. GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Action on a policy—Increased risk—Weight of evidence—New trial.

Action on two policies of insurance. Pleas—That the plaintiff was not interested; that the risk was increased and rendered more hazardous after the insurance was effected.

On motion for a nonsuit, on the ground of the verdict being against evidence, the defendants having substantiated their plea, that the condition against alteration in the premises had not been complied with; or for new trial, on grounds that the verdict was against evidence, and the weight of evidence, *Held*, that the *onus* being on the defendants to establish the alterations and increased risk, the judge could not nonsuit on the plaintiff's evidence, being contradictory in that respect; that from the facts disclosed in the judge's notes, the court would not order a nonsuit; that the verdict was not against evidence, though perhaps against the weight of evidence; that there should be a new trial, to explain the question of increased risk.

The first count of the declaration was on a policy of insurance made by the defendants on the 29th May, 1861, for the sum of \$1,200, on the plaintiff's general stock of hardware, tools finished and unfinished, contained in his framed and plastered buildings, situate on the west side of Water-street, in the town of Galt, for the term of three years.

The second count was upon another policy of the defendants' made on the 28th June, 1861, for the further sum of \$2,800; that is, on the property in the first count mentioned, \$1,200; and on the plaintiff's two-story stone dwelling-house, with framed kitchen attached, situate on the east side of Hunter-street, in the town of Galt, \$800; and on his household furniture, &c., contained in the last mentioned house, \$800, for the term of three years.

The plaintiff then alleged he was interested in the premises and stock of hardware, tools finished and unfinished, in the policies mentioned, to the amount of \$6,000, being the true and actual value of the stock at the time of the loss; and that the stock of hardware, tools finished and unfinished, in

the building in the policies mentioned, were, on the 20th of August, 1863, burnt, consumed, damaged and destroyed by fire, whereby the plaintiff has sustained damage to the amount of \$6,000.

The plaintiff then alleged general performance on his part, and that the stock of the company was sufficient to pay the loss; yet the defendants have not paid it.

The defendants pleaded—1st, a denial of the plaintiff being interested, at the time of the loss, in the stock of hardware, and in the tools finished and unfinished; 2nd, that the said stock, &c., were not burnt or destroyed by fire; 3rd, that the policies were made subject, among others, to the following condition: “If any person insuring any building or goods with this company shall make any material misrepresentation or concealment, or if after assurance effected either by the original policy or the renewal thereof the risk shall be increased by any means whatever, or if such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect.” The defendants then allege that after the insurances were effected, and before the loss, and without the knowledge and consent of the defendants, the plaintiff erected in a certain wooden building in the rear of and annexed to the premises wherein the said goods were situated, certain dye-kettles, and furnaces thereunder, for the purpose of dyeing cloths and otherwise, and kept and used the same until the occurring of the fire; and that through and by means of the erecting and continuing such dye-kettles and furnaces in the buildings, and using the same, the risk upon the goods and tools insured became increased and much more hazardous than at the time of effecting the insurances; and that the plaintiff did not notify the defendants of his erecting the dye-kettles and furnaces, or of his continuing erected and using the same; nor did the defendants ever certify and approve of the same; whereby the policies became void and of no effect. 4th, that the policies were made subject, among others, to the following condition: “Property must be insured in the names of all the owners, and the application must state the interest of each owner, except in the

case of property held in trust or on commission, which must always be insured as such, otherwise the policy will not cover such property in case of loss. The names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be specifically insured." And the defendants aver that the plaintiff was only interested in the goods as the agent of William L. Distin, the owner thereof, and not otherwise; and the plaintiff did not insure the goods in the manner in the condition pointed out, but insured the same in his own name and as his own property; by reason of which the defendants say the goods were not covered by the policies, and the defendants are not liable in respect of the loss. 5th, a plea which has been demurred to, and upon which judgment will be given this term.

The plaintiff has taken issue on the other pleas.

The cause was tried at the last spring assizes held at Hamilton, before John Wilson, J., when a verdict was rendered for the plaintiff on all the issues, and damages assessed at \$1,200 on the one policy, and \$36 for interest, and on the other policy on the demurrer at \$1,200; leave being given to the defendants to move to enter a nonsuit.

In Easter term last, *Anderson* obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, pursuant to the leave reserved, on the ground that the plaintiff's evidence substantiated the plea that the condition against alteration of the premises had not been complied with, and that there was no notice to the company of such alteration, or any waiver of notice by them; and on the ground that no waiver by the company could, according to the statute, be effectual: or why a new trial should not be ordered on the ground that the verdict was against evidence, as above mentioned, and also because it was not shown that the plaintiff was interested in the goods insured.

It appeared from the evidence of Thomas Davidson, the plaintiff's clerk, that the plaintiff had carried on the business of an edge-tool manufacturer for the last nine or ten years, and since 1861, on the premises which were insured. The fire happened on the 20th August, 1863. The value of goods

and stock destroyed was \$4,000. All the goods were plaintiff's, that the witness knew of. The plaintiff made the edge-tools, and he employed and paid the witness; some of the receipts were signed in the name of William L. Distin for hardware. The kettles were in the place they were at the time of the fire, before the fall of 1861.

James Mills said, he had been eleven years in the plaintiff's employment; the kettles were brought from a stone building near; where the kettles then were, the floor is plank; they are in the main building.

William L. Distin said, he was father-in-law of the plaintiff; the property destroyed belonged to the plaintiff; the property was sold under an execution, at the suit of Buchanan, and was bought by Buchanan, who sold it to witness, who gave it to the plaintiff, to enable him to carry on the business; it was *bona fide* his. Witness had before advanced some thousands of pounds, and should do so again if he could; the plaintiff is honest. The axe factory is carried on in the witness's name; it is the witness's. Where the property was, is the plaintiff's. The stock destroyed is part of what the witness bought from Buchanan. Rich, the defendant's agent, came to the building with the plaintiff; they went into it. While there they were talking about the alterations, and from this the witness inferred they went in there for the purpose of examining the alterations; but whether Rich saw the alterations or not, the witness does not know, as he did not follow them. They came back together. The witness said he saw the alteration; he did not think it increased the risk on the goods. On cross-examination he said, the risk was not increased by the removal of the kettles from where they had been to where they were at the time of the fire. The putting in the kettles did increase the risk of that individual house, without doubt, but, considering where they had been, the risk was lessened. The witness gave the plaintiff the goods for the purpose of paying his just debts. The witness should not have set up any claim to them if they had been seized under execution for the plaintiff's debt; he did not know whether he should not have done so.

Robert Patrick said, he was about the plaintiff's place while the alterations were made; he saw Rich with plaintiff where the kettles were; he did not hear their conversation. Rich asked witness where they were going to shift the kettles; witness shewed him. There were three kettles in the old place; one was shifted to the new place, and one new larger kettle put in, making two in the new place; only one of the old ones was used in the old place for heating water, the other kettle was taken out and laid aside; the two in the new place were for dyeing purposes; one of the kettles was built with stone to the rock, and brick around the boiler; the other was on rough stone on the ground, not to the rock, with stone around the kettle; the chimney stack was common to both, and was about forty feet high; the number of fires was not increased; one of the new kettles was larger. The witness was a partner of the plaintiff's in the cloth manufactory. It was for the partnership convenience the kettles were moved from the one building to the other. The partnership was between W. L. Distin and the witness; but the plaintiff superintended it. The pipe from the water-kettle in the old place went through the floor; now it goes into the chimney before going through it.

Henry Stewart said, Patton was a partner in the woollen business; both the old and the new kettles were used.

Andrew Paton said, Rich was at the place either before or just after the alterations.

John Wissler said, he was the first at the fire; he went to the dye-house; the fire was not there; the buildings were consumed; many tools were there, and injured.

A nonsuit was moved for at the close of the plaintiff's case, on the grounds already stated, but the motion was overruled at the time.

For the defence, Abraham J. H. Ball said, he was attorney for the plaintiff in the case of McKenzie against the now plaintiff, when the latter was examined before the judge of the county court. The examination was put in as an exhibit.

Thomas Rich said, he never knew where the kettles were till after the fire; he knew where they had been; he never assented or got the company to assent to the alterations; if

he had known of their being put there, he should have required a note for additional premium.

The learned judge charged the jury, that if the goods were the plaintiff's, and there was no increase of risk by the erection of the boilers, or the company had assented to the change, they ought to find for the plaintiff, \$1,200 on the one policy, and \$1,200 as damages under the demurrer, and they might find interest after six months, which the court might add if properly allowable; and that if the goods were not the plaintiff's, or if Distin had an interest in them, and the risk had been increased and not assented to, they ought to find for the defendants; and he desired them to answer the following questions: Is the property the plaintiff's or Distin's, or is it the property of the plaintiff for any special purpose? The answer was, It is Date's property. Has the risk been increased by any means? The answer was, It has not. Have the buildings been occupied in any way to make the risk more hazardous than when insured? The answer was, They have not. Did the putting of the kettles into the buildings increase the risk to it? The answer was, It did not.

This last term, *Freeman*, Q. C., shewed cause. He would not answer that part of the rule which applied to the verdict being against the evidence; he was content to leave that to the court upon the evidence itself, which fully sustained the verdict that was rendered. He would only argue that part of it which related to the avoidance of the policy on account of the alterations which had been made. This was not a case of the balance of risk, so as to bring it within the decision of *Heneker v. The British America Assurance Company* (13 U. C. C. P. 99); it was a pure question of fact, and entirely for the consideration of the jury to determine whether the alteration was of such a character as increased the risk, and brought it within the terms of the condition of the policy or not; and it had been submitted to the jury, and they had found the issue in favour of the plaintiff, which, as before mentioned, was fully warranted by the evidence. If it had been necessary to sustain the verdict by shewing a waiver by

the defendants of their prior assent to the alterations being made, it could readily be done by a reference to the evidence on this count. He cited Con. Stat. U. C., ch. 52, sec. 34.

Anderson, contra. The case of *Heneker v. The British America Assurance Company* exactly applied to the present one; for here there was a diminution of risk in one place, and an increase in another part; and it was of no consequence whether, on the whole, by striking a balance, the risk was increased or reduced. If it were increased at all in any part, that increase could not be compensated by any reduction in another part, and the policy must be avoided. The jury have found this for the plaintiff; but it is this finding which is complained of, because it is wholly against the evidence. Then, as to the fourth issue, on the question of property, it was also evident that there had been a wrong finding with respect to it; for the property was in fact *Distin's*, and not the plaintiff's, although it was in the plaintiff's possession, and entirely under his control. He referred to *Reid v. The Gore District Mutual Insurance Company*, 11 U. C. Q. B. 345; *Merrick v. The Provincial Insurance Company*, 14, U. C. Q. B. 439; *Hervey v. The Mutual Insurance Company of Prescott*, 11 U. C. C. P. 394; *Lomas v. The British America Assurance Company*, 22 U. C. Q. B. 310; *Jacobs v. The Equitable Insurance Company*, 17 U. C. Q. B. 35; *Lampkin v. The Western Assurance Company*, 13 U. C. Q. B. 237; *Walroth v. The St. Lawrence County Mutual Insurance Company*, 10 U. C. Q. B. 525; *Shaw v. The St. Lawrence County Mutual Insurance Company*, 11 U. C. Q. B. 73.

A. WILSON, J.—The plaintiff proved his *prima facie* case; the *onus* lay upon the defendants to establish the alterations, and that they increased the risk so as to avoid the policy. They did not do so. The plaintiff to some extent anticipated this proof by *Distin's* testimony, which is very oddly expressed, if it be not altogether unmeaning, or at any rate contradictory; and if the affirmative had been on the plaintiff perhaps the judge, upon such testimony, would have been authorized in nonsuiting, for he might not have been able to say that there was any

evidence given of the fact; or if there had been, he might not have been able to say whether it was not as much in favour of the opposite party as of himself. *Trew v. The Railway Passengers Assurance Company*, 5 H. & N. 211. But as the issue was not for the plaintiff to prove, we are not prepared to say the learned judge was obliged to nonsuit, even although the plaintiff may have taken some part of the burden of the proof by anticipating the defence, and did not fully or clearly make it out.

If we were of the opinion that under such circumstances the plaintiff, failing in his proof, should have been nonsuited, we should not direct it to be entered against him, upon the facts appearing in the notes of the trial; for the plaintiff's counsel proposed to ask one or more of the witnesses whether in his or in their opinion the risk had been increased, but was overruled by the learned judge; and if the verdict had to be set aside at all upon this part of the case, the plaintiff should be allowed the opportunity of casting the proof as to the risk entirely upon the defendants, or of perfecting his case if he wished to assume the weight of the affirmative himself.

As to the other branch of the rule, we cannot say it is against the evidence, although it may be strictly against the weight of evidence.

As to the ownership of the goods, it was for the jury entirely to determine it. There was evidence to sustain their finding, although there was much that was very suspicious against the plaintiff, when *Distin* could not declare whether he would or would not have claimed the goods as his own property, if they had been taken for the plaintiff's debts.

We think there should be a new trial, in order that the question as to the alleged increase of risk may be more fully explained.

Per cur.—Rule absolute.

SOULES V. DONOVAN.

Ejectment—Lost fi. fa. lands—Secondary evidence of, when admissible—Nonsuit.

An action of ejectment. The plaintiff's title rested on a deed from the sheriff, and at the trial he was nonsuited for not producing or accounting for the non-production of the *fi. fa.* lands under which the sheriff sold.

On motion for new trial on the ground of the rejection of secondary evidence and misdirection, *Held*, that the plaintiff was properly nonsuited, in not having given sufficient proof of the loss of the *fi. fa.* to admit of secondary evidence; that every place should have been searched where there was reasonable ground to suppose that the *fi. fa.* might be found; that some of the sheriff's papers having been left in the court house, search should have been made among them before secondary evidence was admissible; that affidavits having been filed that diligent search had since been made in the court house, a new trial would be granted on payment of costs.

This was an action of ejectment brought to recover possession of town lot No. 2 on the north side of Louisa street, in the Berczy block, in the town of Barrie. The plaintiff claimed title as purchaser from William Ardagh, who purchased at a sale of the land in question, by the sheriff of York and Peel, under a writ of execution against the lands of Andrew Mitchell, who purchased from Andrew Borland, the grantee of the Crown.

The cause was brought down for trial before Mr. Justice *Hagarty*, at the assizes held in Barrie, in the spring of 1864, when the plaintiff was non-suited for not producing, and not, in the opinion of the learned judge, sufficiently accounting for the non-production of the writ of *fi. fa.* against lands, under which the sheriff of York and Peel sold the land in question to Berczy. Leave was reserved to enter a verdict for the plaintiff, if, in the opinion of the court, sufficient evidence was given to admit of secondary evidence, and if the secondary evidence of the writ was sufficient.

In Easter term last *McMichael* obtained a rule calling upon the defendant to shew cause why the nonsuit entered should not be set aside, and a verdict entered for the plaintiff, pursuant to leave reserved, or why a new trial should not be had between the parties, on the ground that the learned judge should have admitted the evidence of search for the writ of *fieri facias* against lands as sufficient, or why a new trial should not be had between the parties on the grounds of misdirection in requiring an exemplification of the *fi. fa.* against lands, and on grounds disclosed in affidavits and papers filed,

shewing that the writ of *fi. fa.* could not be found, and giving secondary evidence of its contents.

The evidence of the late W. B. Jarvis, who was at the time sheriff of the Home District, then including the county of Simcoe, said at the trial:—"I received execution 16th August, 1838, against lands in the case (*McGill v. Louisa Ann Mitchell*, executrix of Andrew Mitchell, deceased). I produce my book and read therefrom. I have searched for this *fi. fa.*, and I can't find it. My papers have been roughly treated. I have diligently searched, and can't find it." On his cross-examination he said—"I have not searched for writ against goods. I have no doubt there was one. I faintly recollect there was such. The sale was on the 8th February (1840). I never returned this *fi. fa.* lands to the Crown office. I don't know what has become of it. There were investigations about these Mitchell lands, and I have a faint recollection I saw this writ somewhere. Some of my papers are still in the court house, some at my house. I have only searched those in my own possession. I can't swear I saw this writ a few years ago. My recollection is faint of it. I can't say when I advertised, but I know I did so, in the *Gazette* and a local paper of the Home District. I never made an actual seizure." Being re-examined, he said—"I don't think it is at the court house. I think it must have been lost."

Clarke Gamble, Esquire, who was attorney for the plaintiff in the suit said—"I have searched more than once for this *fi. fa.* lands. I don't think it was ever returned to me, nor did I ever see it. I searched in May, 1845, for this writ for some purpose, could not then find it."

Wm. D. Ardagh said—"I found the judgment at Osgoode Hall after a week's search. I got roll exemplified. I found no execution against lands. This was in 1845." Cross-examined—"I don't remember seeing præcipe. I searched for all I could. I am satisfied the writ was not there. I don't remember the *fi. fa.* against goods being there."

For the defence *McCarty* objected to the sufficiency of proof of *fi. fa.* lands, and that there was no foundation laid for secondary evidence of it.

Upon this the learned judge doubted of the sufficiency of proof of *fi. fa.* lands, and directed a nonsuit, giving leave to plaintiff to move to enter a verdict for him, if the court think this evidence reasonably sufficient. The court to direct as the judge should have done at the trial, without leaving anything to the jury.

McCarty shewed cause and contended—1st. There was not sufficient proof of the loss of the *fi. fa.*; and, 2nd. If there was, the secondary evidence did not prove the *fi. fa.* He cited *Sayer*, 208-299; *Rearden v. Minter*, 6 Scott N. R. 237; *Pilcher v. King*, 1 C. & K. 655; 2 *Taylor*, 1295-6; *Gathercole v. Miall*, 15 M. & W. at p. 335; *Douglas v. Bradford*, 3 U. C. C. P. 459.

McMichael, in support of the rule, contended there was sufficient evidence of the loss of the *fi. fa.*, and sufficient secondary evidence of it. He cited *Roscoe* N. P. 10 ed. 96; *McGahey v. Alston*, 2 M. & W. 214; *Taylor* 4 Ed. 385; 2 *Saunders* P. & E. 1301; *Ramsbottom v. Buckhurst*, 2 M. & S. 565; *Gathercole v. Miall*, 15 M. & W. at pp. 329, 330, 335.

JOHN WILSON, J.—We think the learned judge was right in directing a nonsuit. There was not sufficient proof of the loss of the *fi. fa.* against lands to allow secondary evidence of it. The rule is very clear: every place should be searched where there is reasonable grounds to suppose it might be found. It was in the custody of the late Mr. Sheriff Jarvis, in his office, as a matter of course. He said he never returned it to the Crown office, and the plaintiff's attorney says it was not returned to him. Some of the late sheriff's papers were left in the court house, some were in his own possession. He did not search among the former; yet it might reasonably have been supposed to be there. A party desiring to give secondary evidence of a lost document, is expected to shew, that, in good faith, he has exhausted, in a reasonable degree, all the means of discovery which the nature of the case suggests and which were accessible to him. *Taylor* on Ev. 370.

In *Gathercole v. Miall*, *Alderson*, B., lays down this rule: "I think the search should be such as should induce the judge

to come to the conclusion that there is no reason to suppose that the omission to produce the document itself arose from any desire of keeping it back, and that there has been no reasonable opportunity of producing it which has been neglected."

But as the affidavits now filed shew that search has been since made among the papers in the court house not searched before, we are unwilling to confirm the nonsuit, and thus put the plaintiff to unnecessary costs in bringing a new action. A new trial will be granted to the plaintiff on payment of the defendant's costs.

Per cur.—Rule absolute for new trial.

GEDDES V. THE TORONTO STREET RAILWAY COMPANY.

Stat. 24 Vic. ch. 83—Debentures issued under—Coupons appended to—Payable to holder—Choses in action.

The defendants, under the act 24 Vic. ch. 83, issued their debentures, payable in 1887, to which were appended coupons for interest in the following form:

"\$40. Coupon No. 1. \$40. The Toronto Street-Railway Company will pay to the holder hereof, on the 1st July, 1862, at the Bank of Upper Canada, Toronto, forty dollars, interest due that day on bond No. 3.

(Signed) ALEX. EASTON, *President.*"

This action was brought by the plaintiff, as holder of several of said debentures, to enforce payment of the coupons for interest appended thereto, and a verdict was rendered for the plaintiff. On motion for nonsuit, on leave reserved, or for arrest of judgment,

Held, 1st. That there was nothing on the face of the debentures to shew that in the issue thereof the company exceeded the powers conferred by the act above referred to; and that if it was sought to be contended that they had exceeded their powers, that that contention should have been raised by the pleadings. 2nd. That no evidence having been given at the trial to shew that the plaintiff was not the person to whom the debentures in question were given, or for whom they were intended by the company, it was to be presumed that the plaintiff was the proper person, and therefore the judgment could not be arrested. 3rd. The debentures were not void because they were not made payable to any particular named individual or company, as the legal effect of such an instrument must be construed to be an undertaking to pay the monies therein mentioned to the person to whom it was delivered, and who by the effect of such delivery became the payee in fact. 4th. As the plaintiff was not proved to have been the original bearer or payee of the debentures sued upon, and they being choses in action and not assignable, this action could not be brought in his own name unless he shewed he was the bearer payee. 5th. That the debentures or coupons could not be considered promissory notes, as the company had no power to make promissory notes.

Writ issued on the 22nd February, 1864.

Declaration.—The first count alleged that on the 10th

February, 1862, the defendants made their certain debenture or writing obligatory number 3, sealed with defendants' seal, and thereby did promise to pay to the bearer thereof \$1,000, at the Bank of Upper Canada, Toronto, on the 1st January, 1887, and also to pay the semi-annual coupons for interest to the debenture attached, as the same should severally become due, at the rate of eight per centum per annum; and plaintiff says that by one of the coupons in the said debenture mentioned, and made on the day first aforesaid, the defendants promised to pay the bearer, on the first day of July, 1862, at the said Bank of Upper Canada, in Toronto, the sum of \$40, for the half-year's interest which should accrue due on the day and year last aforesaid, on the said sum of \$1,000 in the debenture mentioned, from the 1st January then next preceding; and plaintiff also says, that at the time of the accruing due of the interest aforesaid, and from then until, and at, and after the commencement of this suit, he was and still is the holder of the said debenture and coupon, and as such entitled to the interest aforesaid; and being such holder, and so entitled as aforesaid, he the plaintiff did, when the said last mentioned interest became due and payable, to wit, on the first day of July, in the year last aforesaid, duly demand payment of the said interest from the defendants, at the said the Bank of Upper Canada, in Toronto; yet the defendants did not then or since pay the same, or any part thereof.

There were similar counts on debentures Nos. 4, 5 and 6, for the coupons for the interest due on the 1st July, 1862; four other similar counts on debentures 3, 4, 5 and 6, for the coupons for interest due on the 1st January, 1863; four other like counts on the same debentures for the coupons due on the 1st July, 1863; and four other counts on the same debentures for the coupons for the interest due on the 1st January, 1864. Then follow the account stated, with a claim for \$1,000.

The defendants pleaded, 1st, payment; 2nd, to the last count, never indebted, as alleged; 3rd, to the other counts in the declaration, that the said alleged debentures or writings obligatory are not their deeds.

The cause was taken down for trial at the last spring assizes for the county of Prince Edward, before Morrison, J.

The plaintiff called evidence to prove the signature of the president and secretary of defendants' company to the four debentures set out in the declaration, and also proved the seal of the company to the debentures. The same witness proved that Mr. Easton, who signed the debentures, was president, and that there were three directors—the president, Blakely, and one Smith. He supposed the debentures were handed to the parties who held them. Mr. Easton was the holder at the time, for all he knew. On re-examination he stated he held them at the time for the contractors; he knew of no other contractor but one in Philadelphia; he did not know that Easton was the contractor; he concluded that Easton may have held the debentures as president, for all that he knew.

Defendants' counsel objected, that plaintiff must be non-suited; that the debentures are payable to the bearer, and not assignable; that the action should have been brought in the payee's name; and that the declaration should have shewn that the company had complied with the provisions of the act as to issuing the debentures.

The coupons given in evidence on the trial were in the following form:

\$40.

COUPON No. 1.

\$40.

The Toronto Street-Railway Company will pay to the holder hereof, on the 1st July, 1862, at the Bank of Upper Canada, at Toronto, forty dollars, interest due that day on bond No. 3.

(Signed) ALEX. EASTON, *President*.

The plaintiff's counsel refused to consent to a nonsuit being entered, and the learned judge directed a verdict for the full amount claimed by plaintiff as the interest on the debentures, \$640.

In Easter term last, *M. C. Cameron*, Q. C., obtained a rule to shew cause why the verdict obtained in this cause should not be set aside, and a nonsuit entered, pursuant to leave reserved at the trial; or why the verdict should not be set aside, and a new trial had between the parties, the verdict being contrary to law and evidence; or why the judgment should not be arrested on all the counts except the last, those counts not disclosing any cause of action, as it does not appear

therefrom that the plaintiff was the person to whom the debentures therein mentioned were made, and it appears therefrom that the plaintiff is endeavoring to enforce in his own name a contract entered into between the defendants and a third person.

The rule was enlarged until Trinity term, when *C. S. Patterson* shewed cause. He referred to Prov. Stat. 24 Vic. ch. 83; *Lindley on Partnership*, p. 202. He urged that it did not appear that plaintiff was not the bearer, and therefore the judgment could not be arrested; that section 13 of the statute authorized the company to borrow money and everything would be presumed in favor of the proper exercise of the power. He urged that this was in the nature of a trading corporation, and that they had power to make promissory notes, even if under seal. He cited *East London Water Works v. Bailey*, 4 Bing. 283; *Barker v. Mechanic Fire Insurance Company of the city of New York*, 3 Wendall, 94; *The City Bank v. Cheney*, 15 U. C. Q. B. 400; *Grant on Corporations*, 276; *Aggs v. Nicholson*, 1 H. & N. 165. As to to arrest of judgment, he contended that if it had been shewn at the trial that plaintiff was the person to whom the debentures had been delivered, and who had advanced the money to the company for them, the action would be sustainable, and therefore judgment would not be arrested; for it would be presumed, after verdict, such evidence had been given on the trial. He referred, on the point of arrest of judgment, to *Cloud v. Nicholson*, 8 Mod. 242. He further argued that it was the interest that was sued for, that the coupons produced at the trial were good promissory notes of the company; that plaintiff could recover on them, they being in effect payable to the bearer; and that such notes were good under the statute of Anne, when made by a corporation. He cited *Enthoven v. Hoyle*, 13 C. B. 372.

M. C. Cameron, Q. C., contra. The judgment ought to be arrested, as there is no averment in the declaration that plaintiff was the bearer or person to whom the debentures were delivered by the company. All that is alleged is, that when the coupons became due, and until, and at, and after the commencement of this suit, plaintiff was the holder of the debentures.

tures and coupons; that this might be, and yet plaintiff could not recover, as the bonds or debentures were choses in action, and not assignable. He argued that the company had only power to borrow for a particular purpose, and it was not shewn that these debentures were issued for the purpose for which they were authorised to borrow; that what was done was *ultra vires*, and did not bind the company. He cited *Chambers v. The Manchester and Milford Railway Company*, 10 L. Times, N. S. 715, Q. B., on this point; *The Sunderland Marine Insurance Company v. Kearney*, 16 Q. B. 925; *Green v. Horne*, 1 Salk. 197; *Glyn v. Baker*, 13 East. 509. As to *Grogier v. Mieville*, 3 B. & C. 45, he distinguished the bonds there referred to from those sued on, on the ground that they were issued by the King of Prussia, in a form by which the King agreed to pay the bearer of them the sums made payable thereby; and it was proved at the trial that those bonds were negotiated like exchequer bills, and that action was trover. He referred to *Topping v. The Buffalo, Brantford, and Gode-rich Railway Company*, 6 U. C. C. P. 141. He also urged that plaintiff not being named in the debentures, could not sue on them.

RICHARDS, C. J.—The power of the defendants' company to borrow money, is contained in the 13th section of the statute 24 Vic. ch. 83, and is to the following effect: "The Directors of the Company may from time to time raise or borrow, for the purposes of the Company, any sum or sums not exceeding in the whole one hundred thousand dollars, by the issue of Bonds or Debentures in sums of not less than one hundred dollars, on such terms and credit as they may think proper, and may pledge or mortgage all the property, tolls and income of the Company, or any part thereof, for the repayment of the moneys so raised or borrowed, and the interest thereon: provided always, that the consent of three-fourths in value of the Stockholders of the Company shall be first had and obtained, at a special meeting to be called and held for that purpose."

The case of *Chambers v. The Manchester and Milford Railway Company*, referred to by Mr. Cameron, quoting the

language of Parke, B., in a previous case, puts the question of how far corporations are bound by a deed to which their seal is affixed, upon the true ground, viz., "that it does not bind them if it appear by the express provision of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*, that is, that the Legislature meant that such a deed should not be made." Applying this test to the debentures under discussion, there is nothing on the face of them repugnant to the intention of the Legislature: on the contrary, they seem to be in accordance with the powers conferred by the 13th section of the statute already quoted. If it had been intended to shew that in any respect the authority given by the act had not been properly followed, the question should have been raised by plea, as it was in the case of *Chambers v. The Manchester and Milford Railway Company* referred to, and the facts shewing the irregularity should have been brought out on the trial. In the absence of anything to raise a presumption to the contrary, we must assume that the authority conferred by the company to issue debentures has been properly exercised.

As to arresting the judgment, that will depend on the question if the debentures declared on are absolutely void or not. The only way in which it can be considered that any person is named as a payee in the debentures, is by shewing who it was they were issued to as the bearer, and he would then be the person to whom they were payable, or, in other words, the payee. If it be sufficient to shew that the plaintiff was the person to whom the debentures were delivered by the company, that he was the person from whom they received the money, and for whom they were intended by the company, then we could not arrest the judgment, for we would assume that the necessary evidence was given to shew this on the trial.

The principal point, then, is, are these debentures void for not being made payable to some person by name? In *The Sunderland Marine Insurance Company v. Kearney* (16 Q. B. 925), Lord Campbell referred to the rule laid down in *Green v. Horne* (1 Salk. 197), "that though covenant may be brought on a deed poll, yet the party must be named in the deed." In

the action then pending, the policy of insurance under the seal of the insurance company was made with Kearney, and recited, "that he was interested in or duly authorised as owner, agent or otherwise, to make the assurance," and the action was brought by Kearney and Noonan. Lord Campbell, referring to the rule laid down in the case in Salkeld, said, "It cannot mean that his name of baptism and his surname must necessarily be set out, if he be sufficiently designated in the deed. * * * It seems to us that they (the company) covenanted to pay to the persons who were interested in the subject matter, and for whom the policy was effected; *certum est quod certum reddi potest*." He then proceeds to argue that as Noonan was one of the persons interested in the *freight* assured by the policy, that he was therefore one of the persons with whom the policy was made, and, though not named in it, could sue on it with the person who was named.

In *Maughan v. Sharpe et al.* (10 *Law Times*, N. S. C. B. 870), a bill of sale was made to "The City Investment and Advance Company." It was objected that the defendants who claimed under it were not a corporation, and not named in the deed, and consequently that the deed was void, and the property did not pass to them; but Earl, C. J., said, "I have no doubt (the grantor) considered that there was a company, (and the grantees) held themselves out as a company, and the intention of the grantor was to convey these goods and chattels to the company on receiving an advance from them. I am very clear that individuals may carry on trade under any name or style which they may choose to adopt. If they pretend to be a corporation, and usurp a title which can only be obtained by a grant from the Crown, the law may be enforced against them; but as between these parties, the contract was made with the defendants." Williams, J., in the same case, said, "The question is as to the validity of the assignment from Dolby to the defendants, it being objected that that assignment was inoperative, as it is necessary to name the grantees, and otherwise a grant can have no operation. But I apprehend that it is thoroughly settled that it is not in all cases necessary to designate the grantee by name. In *Shep. Touch* (236) it is said, 'And yet if the grant do not intend

to describe the grantee by his own name, but by some other matter, then it may be good by a certain description of the person, without either surname or name of baptism,' and *id certum est quod certum reddi potest*. The meaning of this grant, according to the ordinary interpretation of language, is to convey the goods to persons using the name and style of 'The City Investment and Advance Company,' which may or may not be a corporation. When it is ascertained who these grantees are, the grant takes effect."

I think we may properly construe the legal effect of the debentures to be, to pay the moneys therein mentioned to the individual to whom they were delivered, and who was thus constituted the bearer; and he would thus be the payee (grantee) named in the bonds. If this be done, the instruments will not be void; and I am of opinion we may, on the authorities referred to, come to this conclusion.

As to the enforcing the payment of the interest on these debentures, by the plaintiff by this action in his own name, if he was not the original bearer and payee of the debentures, I am of opinion he must fail. They are choses in action, and not in their nature assignable. As to the coupons being promissory notes, the company have no power, that I can see, to make notes for that purpose. After going over all the cases referred to, and seeing many others, the old disputed point, whether a corporation, unless authorized so to do by the special act of incorporation, or (in England) by the deed of settlement, can bind itself in an executory contract except by some instrument under seal, lies at the root of the difficulty. I am not now referring to banking and trading companies, which, from the very nature of the business they are incorporated to carry on, have impliedly no power to make notes and enter into contracts not under seal. In some of the cases referred to, the corporations were authorized to make promissory notes under their seal. Of course the notes under seal made by such a corporation so authorized would be good as notes. Some of the cases go so far as to suggest that when the instrument is in the form of a promissory note, and the corporations are specially authorized to make notes, merely putting a seal to it would not destroy it as a note, but it must clearly appear that it was intended to be a note.

In this case, however, there is nothing in the act authorizing the defendants to make notes. The instruments set out in the declaration are not pretended to be in the form of notes, and the coupons which were attached to them were intended to carry out the primary object of paying the interest on the debentures, which interest is payable by the promise under seal to pay the coupons thereto attached.

On the whole, I think the rule must be absolute for a new trial, without costs. If plaintiff shews he was the original payee (bearer) of the debenture or writing obligatory, then he ought to recover; if not, then he should be nonsuited.

Per cur.—Rule absolute.

DICKSON V. McMAHON.

Judgment against absconding debtor—Bona fides of application to set aside.

This was an application by the Bank of Montreal to set aside the judgment obtained in this cause on the ground of fraud and collusion with the absconding debtor.

The defendant, being largely indebted to the bank, absconded on the 24th of May, 1864. Previously, on the 7th of May, having assigned part of his property to the beneficial plaintiff herein. The judgment recovered was on a note for \$1000, dated 1st October, 1863. The summons was issued on the 27th of April, 1864, judgment signed 17th of May, and execution issued on the 25th of same month. The *fi. fa.* was endorsed for \$1037 83 debt and \$17 39 costs. After an application had been made in Chambers to set aside the writ, the beneficial plaintiff admitted that he had only advanced £100 on the note sued on.

Held, that the beneficial plaintiff not denying or explaining the circumstances mentioned in the affidavits filed, or why he allowed judgment to be entered and the *fi. fa.* endorsed for \$1000 in stead of \$400 (the amount actually due him,) until the judgment was attacked, and his explanations not being satisfactory as to the *bona fides* of the transaction, the judgment was fraudulent and should be set aside. That the practice of an attorney, using the name of his clerk as nominal plaintiff, instead of the name of his client, was a reprehensible practice and should be discontinued.

In Trinity Term *C. S. Patterson* obtained a rule on the application of the Bank of Montreal, the plaintiffs in an attachment suit against the defendant, an absconding debtor, calling upon the plaintiff and Michael McMahon, the beneficial plaintiff, to shew cause why the judgment in this cause, and the execution issued thereon, should not be set aside, or why all proceedings upon the said judgment should not be

stayed until the debt due by the defendant to the Bank of Montreal should have been satisfied, on the ground that the judgment was fraudulent, and that this action was brought in collusion with the defendant, an absconding debtor, and for the fraudulent purpose of defeating the just claims of the other creditors of the defendant, with such directions as to costs as to the court should seem fit.

R. P. Jellett shewed cause.

C. S. Patterson supported the rule.

JOHN WILSON, J.—The affidavits filed on the application disclosed that the defendant, being largely indebted to the Bank of Montreal and others, absconded about the 24th day of May, 1864; that within a month next before he absconded, he had represented to the agent of the Bank of Montreal his assets to be worth \$37,000, consisting of—

Nine lots in Toronto.....	\$8,900
Getting titles in Chancery, (supposed to mean mortgages being foreclosed).....	4,000
House and shop in Wellington.....	2,000
Farm in Rawdon.....	2,000
Stone house in Belleville.....	2,000
Two shops in Stirling.....	2,000
Farm in Enniskillen, 200 acres.....	3,000
Notes and account in Wellington, &c.....	14,000
	<hr/> \$37,000

The affidavits further disclosed that between the seventh and thirteenth days of May the defendant had assigned five certain mortgages, the balances due on which were about \$2,481, to Michael McMahon, who is his cousin for the expressed consideration of \$2,275 22. He had also assigned to him another mortgage of £283, for the consideration of \$1,000. He had also conveyed the chief part of the lands mentioned in the above list of assets to the said Michael McMahon for the expressed consideration of \$3,150. That on the 16th of May the defendant had written a letter to Mr. Low, explaining his reasons for absconding and explaining his losses, and some of his transactions. This letter was alleged to have been carried to Picton by Michael McMahon, and there put into the post

office by, or for him, on the 27th of May. That in a conversation with one Donald Campbell on the 24th of May, Michael McMahon, in speaking of his purchases from the defendant, said he had made a good thing out of the defendant, who had acquired the property from their uncle by a will, which, by connivance, had been made to the prejudice of Michael McMahon and his family. That years ago he (Michael) had made up his mind to have his share of the property of his uncle from the defendant; and if he had made a good thing out of him he was only getting his own.

The affidavits further disclosed that the plaintiff in this cause was a clerk of the plaintiff's attorney, who had got the note, which was the cause of action in this suit, from Michael McMahon, with instructions to sue it in some other name than his. This note was the promissory note of the defendant for \$1,000, dated 1st of October, 1863, payable to Michael McMahon or bearer, three months after date. The writ was sued out on the 27th of April, 1864. The claim was endorsed for the full amount of the note and interest. The writ was served on the same day by another clerk in the office of the plaintiff's attorney. Judgment by default was signed on the 17th day of May, and on the 25th of the same month a writ of *fi. fa.* against goods was sued out and mailed from Belleville to the sheriff at Picton, at the express request of Michael McMahon. It was endorsed to levy \$1,037 83 for damages; \$17 39 for costs; interest from the 17th of May \$6, and for the writ \$6. That after an application had been made in Chambers to set aside this judgment as fraudulent, Michael McMahon informed the plaintiff's attorney he had only advanced £100 on this note, which was all he claimed, and then the sheriff was directed to reduce the levy to this sum. In answer to this, Michael McMahon admitted he was the beneficial plaintiff, and that he only advanced to the defendant £100 on this note about the time of the date of it. He denied that he was aware of the insolvency of the defendant, and he denied that the £100, for which he held this \$1,000 note, formed any part of the consideration for the lands he got from the defendant, and he said he did not deduct it because he did not wish to admit that it was he who sued the defendant. He

did not deny in terms that it formed no part of the consideration for the assignments of the mortgages or was not deducted from that amount. He admitted that the defendant had told him he was indebted to the Bank of Montreal and had applied to him for money to pay the bank, which he had agreed to advance upon security, and that with this view he had been drawing in his available securities. He accounted for having received \$500 from one, from another \$300, and from a third \$250, and that he had refused to lend \$1,000 to an applicant because he was getting in all he could for a special purpose. He explained that on the 12th of May, after certain assignments had been drawn, with a view to secure certain advances he was to have made the defendant, he refused and would do nothing but make the purchase of all the lands mentioned above, "an out and out one," as he expressed it. He asserted the conveyance was *bona fide*, and with no view on his part or the defendant's part, to his knowledge, to defeat or delay his creditors, as he believed and was informed at the time the money was to go to the Bank of Montreal. He said he paid some thousands of dollars to the defendant, and gave him a deed of a lot of land in the township of Dummer valued at \$700. He did not deny or explain any of the other circumstances mentioned in the affidavits filed on the application, or explain or deny any thing about the carrying of the letter, or why he allowed the judgment to be recovered and the writ endorsed to levy \$1,000, instead of \$400, until the judgment was attacked as fraudulent. And lastly, in this application the consideration expressed in these conveyances and assignments was distinctly stated, and although falling far short of the defendants own estimate of their value, within a month the defendant failed to account for where he got the money, and although the transaction was recent, he vaguely stated the payment as being of "some thousands of dollars."

His explanation and conduct fail to satisfy us that the judgment is *bona fide*. It will therefore be set aside with costs.

We think the practice reprehensible for an attorney to use the name of his clerk, as was done in this instance, and we hope if such a practice has obtained it will be discontinued.

Per cur.—Rule absolute.

PATTERSON V. SMITH.

Writ of certiorari—Practice after removal by—Change of venue.

Held, that a judge, having all the material facts before him, had a right to grant a writ of *certiorari* and impose such terms as he should think fit, but had not the power to deprive the plaintiff of his legal rights in regard to the position of the cause. That when a defendant removes a cause by writ of *certiorari* the plaintiff has the option to proceed or not, but if the pleadings be removed and stands as pleadings in the Superior Court, the defendant will be in a position to compel the plaintiff to proceed. The plaintiff must declare *de novo*. That a judge has no power to change the venue by the order granting the writ of *certiorari*, as the application for changing venue should be a substantive motion, when the plaintiff has shewn where he will lay his venue after the cause has been removed.

Per J. Wilson, J.—(dissenting from the judgment of the court)—That when a cause is removed by *certiorari* from a county court, the proceedings in the court below should stand and be the proceedings in the court to which the cause is removed.

During Trinity Term *J. B. Read* obtained a rule in the Practice Court, returnable in full court, calling on the defendants to show cause why the order of *Morrison, J.*, dated the 4th day of June last, ordering a writ of *certiorari* to issue, directed to the judge of the County Court of the County of Hastings, to remove the said cause with all the records, matters and things touching the same, from the said County Court into Her Majesty's Court of Common Pleas at Toronto, should not be rescinded, set aside or amended, and why all proceedings had on such order should not be set aside on the following grounds :

1st. That no such order should have been made because issue was not joined in said cause in the court below within six weeks next after the appearance of the defendants to such action or cause, and such order was made after such issue was joined.

2nd. Because such order should not have been granted after joinder of issue, and a jury had been sworn to try the issue in the cause in the court below, and had been duly charged by the judge of the court below and left to find their verdict, and had been dismissed because they were unable to agree upon the verdict.

3rd. Because upon the merits of the application no order should have been made for a writ of *certiorari* to issue to remove the said cause from the court below, and because no order should have been made to change the venue in the cause, at the time of ordering the writ to issue.

4th. Or why such order should not be rescinded by striking out so much of said order as directs that the pleadings therein, save as to the style of the court, and the venue therein do remain as they then stood and hold good for the court above, and that the venue therein be changed from the county of Hastings to the county of Oxford, on the ground that the learned judge had no authority, or in justice ought not to have forced the plaintiff to accept of the issue as it then stood, or if proceedings ordered to remain in court above as they were in the court below, the party removing cause should have been ordered to pay the plaintiff's costs in the court below up to the empannelling of the jury on the abortive trial in such court, or otherwise to pay plaintiff's costs in the court below and on grounds disclosed in affidavits and papers filed.

J. A. Boyd shewed cause and contended that there was nothing in the first three objections, for our practice was now regulated by the 23 Vic., ch. 44, which is in substance like the Imperial Statute 9 & 10 Vic., ch. 95, sec. 90. That as to the fourth ground, the judge had authority to order the venue to be changed, and the costs of the court below to be costs in the cause; as to the first point he cited *Symonds v. Dimsdale*, 2 Ex. 533, S. C. 6 D. & L. 17; *ex parte* The Great Western Railway Company, 2 H. & N. 557; *Parker v. The Bristol and Exeter Railway Company*, 6 Ex. 184; *Lloyds C. C. Pr.* 202-204; *Hankley v. The Grand Trunk Railway Company of Canada*, 17 Q. B. U. C. 472; and as to the second he cited the rule of Trinity Term 1853, which makes the costs of the court below costs in the cause.

J. B. Read, in support of the rule, referred to *Garton v. The Great Western Railway Company*, 28 L. J. Q. B. 103; *Chitty's Arch. Pr.* 1316; *Denison v. Knox*, U. C. L. J. for 1863, 241; *Black v. Wesley*, *Ib.* for 1862, 277; *Pollock's C. C. Pr.* 172, and contended that according to the practice the writ ought not to have been granted, and should be set aside or modified as prayed for.

JOHN WILSON, J.—The Provincial Statute 23 Vic., ch. 44, enacts, "that no cause or suit, instituted in any County Court in Upper Canada, shall be removed or removable from such

County Court by writ of *certiorari* or otherwise, into either of the Superior Courts of Common Law, unless the debt or damages claimed amount to upwards of one hundred dollars, and then only on affidavit and by leave of a judge of one of the said Superior Courts, in cases which shall appear to the judge fit to be tried in one of the Superior Courts, and upon such terms as to payment of costs, giving security for debt or costs or such other terms as he shall think fit." This is in effect like the 90th section of the Imperial Statute 9 & 10 Vic., ch. 95.

The case of *Symonds v. Dimsdale* shows that the subject is entitled to the writ as a matter of right, and the case of the Great Western Railway Company shews that when the jurisdiction is concurrent, the defendant obtaining the writ has a right to it without bearing extra expense. Our own statute, just quoted, gives the judge who orders the writ the power to grant it upon such terms as to payment of costs, giving security for debt and costs, or such other terms as he shall think fit. But the case of *Parker v. The Bristol and Exeter Railway Company* decides that in moving for the writ it is necessary to bring before the judge all the material facts that he may have the power of imposing such terms upon the parties as he may, in the exercise of his discretion, think fit. Here he had all the facts before him and had the right to impose such terms upon the defendant as he saw fit; but we think he had not the power to deprive the plaintiff of his legal rights in regard to the position of the cause. We think, when the defendant removes a cause from the inferior court upon the superior one, the plaintiff has the option to proceed or not; but if the pleadings are removed, as in this case, and made to stand as pleadings in the superior court, the defendant will be in a position to compel him to proceed. We think too, that, in changing the venue the learned judge exceeded his authority. A good reason for removing a cause by *certiorari* may exist in the fact, that the defendant could not have a fair trial in the county court; but the change of venue must be a distinct motion when the plaintiff has shewn where he will lay his venue after the cause has been removed.

If the plaintiff is satisfied to allow the pleadings to stand

as the learned judge has ordered, there can be no objection, but if he is not, then the order will be amended by striking out the words from the order, "and I do order that upon the said cause being removed as aforesaid, the pleadings therein, save as to the style of the court, and the venue therein, do remain as they now stand, and hold good for this court, and that the venue therein be changed from the county of Hastings to the county of Oxford, and I do further order that upon the said defendant succeeding upon said trial, they shall allow and pay to the said plaintiff any extra expenses for witnesses incurred by them arising from such change of venue."

I dissent from the judgment of the court. I think the learned judge in no way exceeded his authority. That this order should have been sustained and the practice established, to which the late learned and venerable Chief Justice alluded in *Hankley v. The Grand Trunk Railway Company of Canada*, 17 U. C. Q. B. 476, that the proceedings in the court below should stand and be the proceedings in the court to which the cause is removed. When the pleadings were different in the inferior court, it was proper the plaintiff should declare *de novo*, but now that the practice and proceedings are essentially alike, there is no reason why they should not stand as they were in the court below. There would be no practical inconvenience, for one of the conditions imposed on the defendant should be that, he would not compel the plaintiff to proceed unless he chose.

I agree that the change of venue should have been a substantive motion. The writ of *certiorari* may be had *ex parte* by the defendant, on whom the judge granting it can impose such conditions as he sees fit, but nothing should be ordered to compromise the plaintiff's rights without his being heard.

Per cur.—Rule accordingly.

REGINA V. CONNOR.

Misdemeanour—Indictment—Form of—Evidence.

The indictment charged one B. C. with obtaining, by false pretences, from one Jacob Teets, two horses, with intent to defraud.

The second count alleged that Richard Connor and Owen Monaghan, on the day and year aforesaid, at the village of A., unlawfully, fraudulently and knowingly, were present aiding, abetting and assisting the said Benjamin Curry, the misdemeanour aforesaid, to commit.

Held, that the second count was good in law, and disclosed an indictable offence against Connor.

Held, also, that the evidence set out below was not sufficient to sustain the charge.

This was a case reserved under chapter 112 of the Consolidated Statutes for Upper Canada by *Morrison*, J., at the assizes holden at Goderich in and for the united counties of Huron and Bruce, on the twelfth day of April, A. D. 1864, and was stated for the opinion of the Court of Common Pleas as follows :

At the last assizes holden at the town of Goderich, in and for the united counties of Huron and Bruce, Richard Connor was tried and convicted before me upon an indictment in the following words :

“County of Huron, one of the united counties of Huron and Bruce, to wit :

“The jurors for our lady the Queen, upon their oath, present that Benjamin Curry, on the seventh day of March, in the year of our Lord one thousand eight hundred and sixty-four, at Amleyville, in the township of Morris, in the county of Huron, one of the united counties of Huron and Bruce, unlawfully, fraudulently and knowingly, by false pretences, did obtain from one Jacob Teets two horses, of the said Jacob Teets, with intent to defraud. And the jurors aforesaid, upon their oath aforesaid, do further present that Richard Connor and Owen Monegan, on the day and year aforesaid, at Amleyville aforesaid, unlawfully, fraudulently and knowingly were present, aiding, abetting and assisting the said Benjamin Curry, the misdemeanour aforesaid, to commit.”

The following evidence was given at the said trial :

Jacob Teets—I live in Artemesia. I know defendant ; saw him first at Read's tavern in Grey in Huron. I had a span of horses and sleigh of my own with me. One Benjamin

Curry was tending the bar; he asked me if I wished to sell the horses; I said I would and that the price was \$150; he then told me he would buy them, but had not the money, as he laid it all out in the purchase of a farm, which he pointed out to me, on which a large barn was erected, and that he had himself sold a pair of horses and taken a note for them; he said he would get a man to back his own note as security, if I would let him have the horses. This conversation took place part in the house and in the road; defendant was all the time in the tavern. We then tried the horses; came back to the tavern, when Curry said to defendant, "Dick, wont you give security for the horses for me;" defendant said "I wouldn't mind or be afraid to go your security." Both Curry and defendant went into the shed and conversed together; I went into the tavern and they came in shortly afterwards; after they came in we talked about the price; defendant thought them at first too dear, and finally they concluded to give me \$150 for them; I said to them I want to be sure I was selling the horses, so that I could get my money; Curry said that defendant had a deed for the 200 acres across the road and would back the note; I asked the defendant if he had the deed; he said he lived on the corner of the lot; I asked him a second time and he hesitated, and Curry said to defendant "why don't you tell the man you have the deed of the land," when defendant said "that's so." A note was drawn for \$149 at a month's date; Curry saying that he had only a dollar at that time which he delivered. At first he thought he could pay me \$15 at the time. A pedler drew the note. Curry signed it and pushed it to defendant, when defendant said he never wrote his name, when Curry put his name and defendant touched the pen; defendant's name was on the back, which I did not at first notice. I desired to have it drawn differently, but Curry said it was all right, and I took the note. Curry and defendant drove the horses a short distance and returned and put them in the stable; never saw them but next morning since. After I sold the horses that day I heard defendant say to Curry I'll take this horse, Curry saying no, I'll take them both. Shortly afterwards Curry and defendant had a fight about the horses; I ascertained afterwards from a per-

son living on the lot defendant said he owned, that defendant did not own it; that evening defendant came to me with another person and said that he (defendant) had never signed the note and would not be answerable for it; I told him I would take back the horses; defendant said he would not take any trouble about them; defendant then said he had no property, and the person with him, in defendant's presence, also said defendant had no property.

Cross-examined—When I sold the horses I was about sixty or seventy miles from home; I did not know the parties; one Monaghan told me the men were good for the money; I asked defendant if he owned the 200 acres, he said he lived on the corner of it, subsequently to the question of Curry, why didn't he say he had the deed, "that's so." Produces the note. Defendant understood perfectly well what he was doing. Never saw the horses except next day; I got a writ for them but could not find them; I stopped there about three weeks looking for them. Curry said he had purchased a farm a few days before and paid \$700. I would not have allowed the horses to go if I did not think defendant owned the lot he said he did; I would not have given the horses to Curry alone without some person going security for him; when defendant said he would not be responsible for the note he said he was not worth anything. Next morning Curry said if I would give him \$5 he would give back the horses. Curry was present when defendant said he would not be responsible for the note; afterwards there was an agreement made with Curry, that if he did not give back the horses in a month he would pay the \$149, in writing produced. I still held defendant responsible on his note. We had drunk some but consider that we were all sober before they signed the note, but drank a good deal after.

Daniel Reid—I saw the note drawn and defendant put Connor's name on the back; defendant saw Curry put his name on the note; defendant stepped forward when he heard Curry was going to put the name of Peter Donelly on it.

David Hamilton—Defendant asked me to go with him as a witness that he would not stand security for the note; defendant either said it was on the note or not on it; defendant

asked prosecutor who put his name on it ; defendant said he didn't touch the pen. The land opposite the tavern belongs to my brother ; defendant lives on the corner of it ; defendant can't write ; I can't tell whether he can read ; defendant is worth his hands and health. The parties were all pretty well on.

DEFENCE.

Judge Cooper—Knows defendant ; has very good reputation as to character ; an honest man, but not a clever man ; known him three or four years.

Elizabeth Reid—Prosecutor came to me at the time and asked me about Curry ; I said he was a working man, and that I did not know whether he owned any property ; I said there is his wife ; she said she had nothing to do with his business ; I heard no conversation about the lot of land.

John B. Harold—I saw on the occasion prosecutor and Curry driving the horses, and heard Curry say the horses are mine. Prosecutor asked me about Curry ; I said I did not know whether he was worth ten cents. As to defendant, I told prosecutor I knew nothing about him except seeing him about the tavern ; I saw Curry write defendant's name on the note ; he did not touch the pen ; I know nothing about the bargain ; I should say they were (all) not sober ; prosecutor had the least.

Robinson, Q. C., objected that defendant could not be charged, as in this indictment, as an accessory to a misdemeanor, and that in fact he has committed no crime ; that the evidence shews that by any misrepresentation of his he obtained no property. Having some doubts, the learned judge allowed the matter to go to the jury and reserved this case for the consideration of the court. He left the case to the jury to say whether the defendant, by his misrepresentation as to his property, induced the prosecutor to part with the horses or one of them to Curry, if so to find defendant guilty.

The jury found the defendant guilty, saying that they found defendant aided and assisted Curry in obtaining the horses from the prosecutor.

Defendant gave recognizance to appear at the next assizes to receive judgment.

The following are respectively copies of the note and endorsements thereon, and of the agreement in writing mentioned in the learned Judge's notes of the evidence.

March 7, 1864.

One month after date, I promised to pay Jacob Teets, or bearer, the sum of one hundred and forty-nine dollars for value received.

(Signed,) BENJAMIN CURY.

Witness—(Signed,) JOHN BUHARRED.

(Endorsed,) RICHARD D. CONNOR.

March 8, 1864.

Agreement between Jacob Teets, of the township of Artemesia, and Benjamin Curry, of the township of Grey:—"The said Benjamin Curry doth hereby agree to pay unto the said Jacob Teets the sum of one hundred and forty-nine dollars one month after date, for value received, or otherwise return unto said Jacob Teets the following property in as good condition as when it was delivered to the said Benjamin Curry; that is to say, one span of horses, harness, whippetres, neck-yoke, blankets, whip and sleigh, and bag full of oats, and further doth agree to pay any damages that shall happen to any of the above named property while in his possession."

(Signed,) BENJAMIN CURRY.

Witness present—Owen Monan, his + mark.

The learned judge reserved the following questions for the consideration and opinion of the justices of Her Majesty's Court of Common Pleas for Upper Canada, viz:

1st. Whether the indictment charging the defendant Connor with aiding and abetting Curry to commit the misdemeanor alleged, is sufficient in law and discloses an indictable offence against Connor.

2nd. Whether there was sufficient evidence to go to the jury to sustain the indictment against the defendant Connor. And the opinion of the said justices he requested upon the said questions under chapter 112 of the Consolidated Statutes for Upper Canada.

S. Richards, Q. C., for the Crown.

Robinson, Q. C., contra.

RICHARDS, C. J.—We are of opinion the indictment is good. The defendant is charged as a principal in the second degree, being present aiding and abetting the principal in the first degree to commit the misdemeanor complained of.

As to the evidence, we think the prosecutor's own statement with the written memorandum made the next day, whereby Curry undertakes to return the property in a month if not paid for, repels any idea that he parted with his property in consequence of any false pretence set up by Curry and concurred in by Connor. He seems to have parted with the property the next day under the new arrangement, and it would be carrying the law much further than I have seen it in any case I have met with, to hold the defendant liable when the prosecutor himself seems to have consented to the property passing from him under quite a different arrangement from that out of which the false pretence arose. We are of opinion that the said defendant ought not to have been convicted on the said indictment, and that there was not sufficient evidence given on the said trial to sustain the said conviction. It is not that the false pretence on the first day is clear, and that the transaction of the second day condoned for it, but it is, that what took place on the second day reflects upon the nature and character of the bargain on the first day.

Per cur.—Judgment quashing the conviction.

MAY V. ROUTLEGE.

Interpleader issue—Purchase under chattel mortgage—Change of possession after.

An interpleader issue to try the right of plaintiff to goods seized under an execution against Lafer. A verdict was given for plaintiff for the part of the goods contained in a chattel mortgage to one Lawrence. The judgment debtor mortgaged certain goods to Lawrence under a power of sale, in which mortgage the goods were sold to F. as agent for plaintiff and defendant, they giving their notes therefor, which satisfied the mortgage.

Held, that the notes given having gone to pay L.'s mortgage, the same was satisfied, and plaintiff and defendant having bought under the mortgage, and become absolute purchasers of the goods, neither had any right to enforce any claim under the mortgage to L. That from the fact of plaintiff and defendant allowing the judgment debtor after the sale to carry on business in their names at first, and afterwards in the name of the plaintiff, there would seem to be some secret arrangement not disclosed. That the judgment debtor, after the sale under the chattel mortgage, having con-

tinned to have both the possession and disposition of the goods, the defendant might, as a *bona fide* judgment creditor, have insisted on the plaintiff's claim being fraudulent, had he not from the first been a party to the transaction. That the plaintiff's conduct left it to be inferred that he had transferred all his interest in the property in question, however acquired, to the judgment debtor.

This was an interpleader issue before the Chief Justice at the spring assizes for York and Peel in 1864, to try whether certain goods seized by the sheriff of York and Peel, under a *fi. fa.* received by him on the 16th of May, 1864, on a judgment of defendant Rutledge against one Ira S. Lafler, were at the time of seizure the property of the plaintiff May.

The jury, by a sealed verdict, found for the plaintiff for the goods contained in the chattel mortgage from Lafler to one Lawrence, but *Morrison, J.*, who took the verdict in the absence of the Chief Justice, entered it for the plaintiff generally, instead of entering it for the plaintiff in respect of the goods mentioned in the schedule attached to the said mortgage, and for the defendant for the residue of the goods seized.

In Easter Term, *Burns*, for the defendant, obtained a rule to shew cause why the verdict should not be set aside and a new trial had between the parties, on the ground that the verdict was contrary to law, evidence, and the charge of the learned Chief Justice, and on the ground that it had been incorrectly entered, in not being for the plaintiff, only for the goods mentioned in the schedule attached to the said mortgage, and for the defendant for the rest of the goods seized, and on grounds disclosed in affidavits and papers filed.

In Trinity Term *R. A. Harrison* shewed cause, and contended that the case had been properly submitted to the jury, who had found for the plaintiff for such part of the goods as were mentioned in the schedule, about which there was some question, but which the court could easily ascertain. That as to the rest, there was no objection to have a verdict for the defendant.

Burns, contra, contended that the goods were those of Lafler, not the plaintiff's, whose claim was fraudulent in every aspect of the case; that the whole evidence shewed that the

plaintiff's claim was not *bona fide*; that the verdict for part ought to be entered for the defendant, if the court was not of opinion that a new trial ought to be granted.

JOHN WILSON, J.—The case is thus stated by the learned Chief Justice who tried the cause:

Lafler owned all these goods, and mortgaged them to Lawrence. In this mortgage there was a power of sale which he put in force. At the sale, by some understanding between Lafler, plaintiff and defendant, one Franklin bought the goods for plaintiff and defendant, who gave three promissory notes to Lawrence for \$750 each, a sum larger than the price of the goods sold to Franklin, but for the amount of the debt due by Lafler to Lawrence. One Canover joined in these notes, but it does not appear he had any interest in the purchase. Lafler gave to Lawrence a mortgage on the foundry itself as a collateral security for the chattel mortgage, but the foundry was subject to a previous mortgage to Rice Lewis.

Lawrence assigned his mortgage to May, who also advanced \$1,000, which Lewis accepted together with a note for \$200 made by Lafler, in full of his claim on the mortgage, and this was also assigned to plaintiff. All the money paid by plaintiff and defendant on the notes went to pay Lawrence. The chattel mortgage was thus satisfied, and with it the mortgage given to Lawrence as a collateral security was also satisfied, although not discharged. If plaintiff and defendant, through their agent Franklin, were absolute purchasers of these goods under the power of sale, and paid for them, they can have no right, or can either of them have any to enforce the mortgage given to Lawrence.

From the manner in which the parties acted afterwards, allowing Lafler to carry on the business under their joint names in the first instance, and afterwards in the name of the plaintiff, it may at least be suspected that there was some arrangement which Lafler did not put into writing, but preferred to trust to the honor of plaintiff and defendant to let him have the goods back, when he paid for them. In fact he had both the possession and disposition of the goods after the sale under the power in the mortgage, and but for the posi-

tion of the defendant as a party to the transaction from the first, he might as a *bona fide* judgment creditor of Lafler, insist with great force, that there is evidence of sale to Lafler, and of possession and dealing with the goods as his own sufficient to make plaintiff's claim fraudulent.

In what manner the defendant retired, as he appears to have retired from the affair, is very indistinctly shewn. It does not appear what part, if any, of the money due on the notes the defendant paid to Lawrence. It would appear from the evidence, that the defendant cannot deny that he and plaintiff were the purchasers of these goods, and that unless it appears that the plaintiff's interest, so acquired, was extinguished by subsequent transactions, he had the share so purchased jointly with the defendant, and according to Lafler's evidence, the defendant gave up to plaintiff his interest in the purchase, thus leaving it to be inferred he had paid nothing.

From the dealings of the plaintiff with Lafler in 1862 and 1863, as shewn by the accounts stated between them, it may fairly be inferred that the plaintiff had given up his previous right in this chattel property and transferred it to Lafler, and if so he ought not to recover.

In one view of the case, the plaintiff is joint owner of the goods with the defendant.

In another view the plaintiff, by the joint purchase and the defendant giving him his interest in the goods, was the sole owner.

Lastly, which ever of the views is the true one, the plaintiff by his conduct leaves it to be inferred, that he has transferred all his interest, however acquired, to Lafler.

The paper of 1862, signed by Lafler, written chiefly by plaintiff and witnessed by Hyde, shews plainly that plaintiff treated Lafler as a debtor for the money paid by plaintiff to Lawrence for the purchase of the goods. Under date of the 1st of June, 1862, the plaintiff signed a paper claiming the very same sum of \$3,985 35, which Lafler had admitted he owed, to be due to him and to be payable in two years. He gave a receipt, dated the 23rd of September of that year, for \$300 interest on that principal sum. The paper of the 24th of October, 1863, is an account made up against Lafler by

plaintiff, making him debtor to plaintiff in the precise sum of \$5,000. Then follows a receipt, signed by plaintiff, of payment in full by a deed in fee from James M. Bussell, of the land and foundry standing on it. At that time the plaintiff was the assignee of the mortgage to Lewis and of the one to Lawrence, and for a reason which Bussell explains, he was seized absolutely of the equity of redemption by a conveyance from Lafler. But the reason for that conveyance having failed, Bussell held this equity of redemption for Lafler's benefit, and Lafler gave a written direction to convey it to plaintiff, and Bussell actually executed a conveyance to which some objection was raised by plaintiff's solicitor, and it was not taken by plaintiff and so stands, Bussell being ready to convey.

Under these circumstances we think the evidence does not sustain the verdict, and the defendant may have a new trial on payment of costs. If he declines to take it, the verdict will be entered for the plaintiff for the goods found by the jury, and for the defendant for the rest; about which goods we understand the parties are now agreed.

Per cur.—Rule accordingly.

HARPER ET AL. V. PATERSON ET AL.

Statute of Frauds, section 7—Trusts—Declaration of—Subsequently made—Takes effect from the creation of the trust—Promissory note—Cannot be varied by parol agreement.

Action by executors of one D. B. on a promissory note dated 9th May, 1863, for \$1,600 made by defendant P. and endorsed by defendants C. and B. to which defendant pleaded that in April, 1861, the testator held a promissory note for the same amount made by P. and endorsed by C.; that before the same became due it was agreed by P. and testator that if P. would convey certain lands to defendant C. in trust to secure the said note or any renewals and when and so often as said renewals should become due, that he would give a renewal note endorsed by C. and B. and pay interest at the rate of ten per cent. per annum in advance, that he (the testator) would extend the time for payment of the amount of said note for three years; that upon such agreement P. conveyed the lands to C. in fee simple, and from time to time, as the notes and renewals became due, P. paid the interest and gave renewals as agreed upon; that when the note now sued upon became due the interest and a renewal note, in accordance with the agreement, was tendered to testator, who refused to accept the same, and that the term (three years) had not expired. The testator subsequently died.

On the trial the facts, as set out in the pleas, were substantially proved, and it was shewn that previous renewals had been made by leaving the renewal

note at the agency of the Bank of Montreal in Cobourg, paying the interest and taking up the old note, and when the note now sued upon became due a renewal note, in accordance with the agreement, and the interest, was tendered to M. the agent of the said bank, who refused to accept the same, alleging he had no instructions. All the renewals, except one which was made with the testator personally, were made at said bank. The deed was produced at the trial and was absolute on its face to C. and not registered. Several objections were taken at the trial, and on the argument it was thought better to raise the question for the consideration of the court by demurrer, which was done, and the amount to be allowed to stand as an assessment of contingent damages for the plaintiff on the demurrer, was to be fixed by the court. The plaintiff was allowed to demur to the defendant's pleas.

Held, 1st. That the tender of the renewal note and interest to M. the agent of the Bank of Montreal, where the note was payable, was a sufficient tender, as all the other renewals were made there; that defendant was not bound to tender another renewal and the interest at the expiration of three months from the last tender, as plaintiff had, by his refusal to accept the former tender, repudiated the agreement, and the defendant was not informed that he would accept such renewal.

2nd. That by the 7th section of the Statute of Frauds all express trusts in respect of real estate require to be in writing, signed by the party who is to declare the trust, and though the deed to C. appears absolute on its face, still it is settled that the statute will be satisfied by any subsequent acknowledgment expressed by him in writing declaring the trust, and that the trust, however late the declaration or proof thereof may be, will take effect from the date of its creation.

On demurrer, *held*, that the effect of the defence set up is to vary the terms of the note sued upon by a parol agreement made prior to the note itself, and therefore judgment must be for the plaintiff; that as to the rate of interest to be allowed there is nothing before the court to shew that plaintiff is entitled to a higher rate than the legal rate of interest, except under the agreement which he expressly repudiates, only 6 per cent. can be allowed.

The writ issued on the 8th of December, 1863.

Plaintiffs declare on a promissory note made by defendant Patterson on the 9th of May, 1863, in the lifetime of plaintiff's testator, whereby he promised to pay, three months after the date, to the order of the defendant Cockburn, at the office of the Bank of Montreal at Cobourg, \$1,600; and Cockburn endorsed and delivered the note to Boulton, who endorsed the note and delivered it to testator, and the same became due in his lifetime, and was duly presented for payment and dishonored, whereof the defendants had due notice. By means whereof the defendants became jointly and severally liable to pay the testator, in his lifetime, the money in the note specified, yet the defendants have not nor have any of them paid the same either to testator, in his lifetime, or to the plaintiffs as such executors as aforesaid, since the death of the testator, and plaintiffs as executors as aforesaid claim \$2,000.

The defendant Patterson said that before the making and endorsing of the note in the declaration mentioned on the 11th of April, 1861, testator, in his lifetime, had discounted and was the holder of another promissory note for the same sum as the note mentioned in the declaration made by Patterson, payable three months after date to Cockburn, and endorsed by him to testator for the accommodation of and as surety for Patterson, and without any value or consideration for such endorsement as testator well knew, and Patterson further saith that afterwards, and before the note became due, it was agreed between Patterson and testator if he would convey to Cockburn the south part of the east half of lot sixteen, in the third concession of Vespra, and certain other lands particularly mentioned in the plea, containing seventy acres, to hold in fee simple, in trust to secure the said note, and any renewal thereof, and if, when the said note became due, Patterson would renew the same by his note at three months, and would obtain the endorsement thereon and on any renewal thereof of the defendant Cockburn, and the defendant Boulton, and would pay testator interest thereon for three months on the note, and each renewal thereof, in advance, at the rate of ten per cent. per annum, testator would extend the time for the payment of the note made by Patterson and endorsed by Cockburn for three years from the time of making the agreement, and would not enforce the payment of any note so made by Patterson, and endorsed by Cockburn and Boulton, until the said period of three years had elapsed; and Patterson further says that the agreement having been so made, he conveyed to Cockburn the lands aforesaid in fee simple, in trust as aforesaid, and made the note and paid the interest in advance at ten per cent. per annum, and Cockburn and Boulton endorsed the note and delivered the same to the testator in pursuance of the agreement aforesaid; and Patterson further says that he did from time to time, as the said note and renewals thereof became due, make a new note in renewal thereof, endorsed by Cockburn and Boulton, and delivered the same to testator and paid the interest in advance on each of the said renewals to the testator at the rate of ten per cent. Patterson further says the note in the declaration mentioned is a renewal of the original note so made, and was

made by him and endorsed by Cockburn and Boulton in pursuance of the said agreement and not otherwise, and that on the day when the said note, in the declaration mentioned, became due, Patterson made his promissory note for the same sum as the note in the declaration mentioned, payable three months after date to Cockburn or order, and Cockburn and Boulton endorsed the same in blank, and Patterson then tendered or offered it to the testator in renewal of the note mentioned in the declaration, and tendered and offered testator to pay him the interest for three months at ten per cent. in advance, and though the said term had not then nor had it since expired, and although Patterson had always done everything on his part to be done according to the agreement, yet testator would not accept nor receive the last mentioned note so endorsed, nor the interest thereon, but wholly refused so to do, and afterwards testator died and Patterson says that by the agreement, as aforesaid, the right of action of the plaintiffs, as executors as aforesaid on the said note, was suspended before and at the time of the commencement of this suit.

Similar pleas were separately pleaded on behalf of the defendants Cockburn and Boulton, on all of which issues were joined.

The cause was taken down to trial at the winter assizes for York and Peel, held before Mr. Justice Hagarty in January last.

At the trial it appeared that defendant Patterson had obtained a loan of \$1,600 through Mr. Cockburn, who was testator's solicitor. He gave a note for the amount payable to Mr. Cockburn's order at three months, who endorsed the note for the accommodation of the maker, and testator knew this. Whilst this note was current it was arranged on behalf of Mr. Patterson, between Mr. Cockburn and testator, that the loan should continue for three years; that the note should be renewed every three months for the \$1,600 and ten per cent. interest paid thereon in advance, and the renewals should be endorsed by Cockburn and Boulton; that Cockburn should take security in his own name on real estate as collateral. Under this agreement the note was from time to time renewed

with the endorsation of Cockburn and Boulton. The way in which each note was renewed was to take the renewal, with the ten per cent. interest in advance, to Mr. Morgan the agent of the Bank of Montreal at Cobourg, by whom the note to be retired was held. On delivering the new note, and the ten per cent. interest in advance, the old note would be given up. This course was pursued and no difficulty arose until the note now sued on became due. On tendering a new note for the amount at three months, and the interest in advance at ten per cent., Mr. Morgan declined to receive it, saying that testator was then ill, that he had not seen him and had no instructions from him. There was a conveyance or deed of security produced by defendants, dated 1st June, 1861, and was not registered. All the renewals, except one which was with testator personally, were effected through Morgan.

Mr. Morgan, the agent of the bank, after stating that the first note, without Boulton's endorsation, was left at the bank for collection for testator, and that it was renewed from time to time with Boulton's endorsation and \$40 interest paid on each note as it was renewed, and added that in August last when application was made to renew the note, testator had removed to Port Hope, and said he was going to the sea side, and as he was away and not well, he (Morgan) told the person who came with the renewal he had better let it stand, and it was not renewed. He added that testator used to call generally before each note matured. On cross-examination he stated he knew nothing of any definite period of three years. He thought he had better not take the renewal in August as testator was ill.

On the trial it was objected by the plaintiff that the agreement set up by the defendants was not valid because it was not in writing; that it was not to be performed within a year and it related to land, and did not support the plea which stated that the conveyance made to Mr. Cockburn was to be made in trust, and the deed, when produced, was absolute, and it was not registered; that the renewal note and interest should have been tendered personally to the testator and not to Morgan, and the tender was insufficient; that as three months had expired before the commencement of the suit,

another tender of a note and interest should have been made, that parol evidence could not be allowed to vary the terms of a promissory note.

It was finally agreed that a verdict should be rendered for the defendants, with leave to plaintiffs to move to enter a verdict for them for the amount of the note and six or ten per cent. interest as the court might think fit, if the court should think the plea no defence or that the objections taken should prevail.

After the argument, by consent of parties, the record was amended by plaintiffs demurring to defendants' pleas, and adding an assessment of damages on the demurrer for the plaintiff for the amount of the note and interest, the rate of interest to be fixed by the court at six or ten per cent. as they think right.

In Hilary Term *Hector Cameron* obtained a rule calling on the defendants to shew cause why the verdict entered for the defendant should not be set aside, and a verdict entered for the plaintiff pursuant to leave reserved for the amount of the note and interest at the rate of ten per cent. on the following grounds :

1. That parol evidence to qualify or alter the terms of the note sued on was inadmissible.

2. That an agreement to renew such as was proved in evidence is invalid and insufficient to sustain a verdict for the defendant, not being in writing, nor to be performed within a year, and relating to lands.

3. That the defendants did not prove their several pleas, and did not fulfil the alleged agreement to convey the lands therein mentioned in fee in trust to secure the said note and any renewal thereof, the conveyance being an absolute conveyance and not in trust, and being unregistered.

4. That the tender of the said renewal note and the interest proved in evidence was insufficient, not being made to the plaintiff's testator, and the interest not being tendered in cash, and the tender of another renewal and three months additional interest not being made three months after the maturity of the note sued on.

5. That the plaintiffs are entitled to interest at the rate of ten per cent. per annum from the maturity of the note sued on.

During the term *Galt*, Q. C., shewed cause, and contended that the agreement set up by the defendants was binding; that it had been performed by them as far as they could perform it, and they had been ready and willing and offered to perform those conditions which were yet, on their part, to be performed; but that plaintiffs testator refused to permit that to be done. He also urged that the note being an agreement not under seal, could be released, or another agreement substituted for it before breach; that the agreement was therefore binding and the defence ought to prevail. He referred to Chitty on Bills, 10 edn. p. 84; *Goss v. Lord Nugent*, 5 B. & Ad. 58, 65; *Osborne v. Earnshaw*, 12 U. C. C. P. 267; *Caverhill et al. v. Orvis*, Ib. 392.

Hector Cameron, contra, argued that the agreement, not being in writing, could not operate to vary the terms of the note, and that part of it being to convey lands, made it still more imperative, under the Statute of Frauds, that it should be in writing. He referred to *Adams v. Wordley*, 1 M. & W. 374; *Brown v. Langley*, 4 M. & G. 466; *Besant v. Cross*, 10 C. B. 895; *Webb v. Spicer*, 13 Q. B. 886, 894 S. C. *sub nom.*; *Salmon v. Webb*, 3 Hof. Law Cases, 510; *Hall v. Francis*, 4 U. C. C. P. 210. He further urged that the agreement had not been completed as the conveyance of lands made by defendant Patterson was absolute, and not in trust as agreed upon between the parties; that the tender of the note and interest should have been to plaintiffs' testator himself; that tender to the agent of the bank at Cobourg was not a sufficient compliance with the agreement. He contended, in conclusion, that as there was another payment of interest and tender of renewal note, according to the agreement, necessary in November, before this action was brought, plaintiffs must recover in this action, for there is no legal justification for defendants omitting to pay the interest and deliver the note at the time last referred to.

RICHARDS, C. J.—After the amendments are made the case comes before us for consideration on two points—1st. Whether

the pleas which are substantially the same as to all the defendants have been proved, and 2nd. Whether the facts stated in the pleas afford a good answer to the action. As to the first point I think the pleas substantially sustained by the evidence. The first and second grounds of objection taken in the rule will more properly arise in considering the demurrer. The most formidable objection is the third ground taken in the rule, that the conveyance by Patterson to Cockburn was absolute on its face and did not appear to be in trust and is not registered. The seventh section of the Statute of Frauds would seem to require that all express trusts in relation to real estate should be in writing, signed by the party who is to declare the trust or in his will, or else they shall be utterly void and of none effect. In Lewin on Trusts, at p. 62, it is laid down, that trusts are not necessarily to be declared in writing, but are only to be manifested and proved by writing, for if there be written evidence of the existence of such a trust, the danger of parol declarations, against which the statute was directed, is effectually removed. This construction of the section seems now fully established. It is further laid down, at p. 63, "that the statute will be satisfied by any subsequent acknowledgment of the trustee, as by an express declaration by him or any memorandum to that effect, or by a letter under his hand, by his answer in chancery, &c., and the trust, however late the proof, takes effect from the creation of the trust." The deed which was produced at the trial was not amongst the exhibits handed to us, but it is admitted it was absolute in its form, and there was no trust expressed in it. There was no evidence at the trial to shew that Cockburn had in any way before the commencement of the action, in writing, admitted he held the land conveyed by the deed in trust. There can be no doubt that the plaintiff's testator had an interest in having the trusts declared in relation to the land, for it would have enabled him to have compelled the trustee to apply the proceeds of the land to the payment of the note, if in the end he found it necessary to do so. In this view therefore, it may be said the evidence did not shew that the trust had been legally created. But inasmuch as the authorities shew that the written acknowledgment of the

trustee, given at any time, would relate back to the creation of the trust, we would not order a verdict to be entered for the plaintiffs on this plea without giving the defendants the opportunity of shewing, on a trial, that the necessary written acknowledgment of the trust had been given so as to put that question beyond a doubt. As to the fourth ground taken in plaintiffs' rule we think there was evidence of a sufficient tender of the renewal note and interest. The same having been made to the person and at the place where the former renewals were tendered and accepted; and we further incline to the opinion that the note and interest tendered pursuant to the agreement, having been refused, that was substantially a repudiation of the contract, and defendants were not bound to tender another note and instalment of interest until it was intimated that the plaintiffs' testator would have accepted it. On these questions it is not necessary for us to dwell at much length, or give them much further consideration. As at present advised we are not prepared to order a verdict to be entered for the plaintiffs on the pleas, for we believe the defence set up is substantially made out, or can be made out. As far as the plaintiffs are concerned, the action is one which has no merits and seems to have been brought to enforce the payment of the money loaned to the maker of the note at an earlier period than that at which, by the express agreement of the testator it ought to have been paid.

Nevertheless we feel bound to decide the demarrer in favor of the plaintiffs. The effect of the defence set up is to vary the terms of the note declared on under a parol agreement made prior to the note itself. We think the authorities are in favor of the plaintiffs on this question. One of the latest cases, and one which resembles this more closely than any we have met with is *Flight v. Gray*, 3 C. B. N. S. 320, which is quoted generally as authority for another purpose, to shew that a plea, by way of equitable defence, is not good under the Common Law Procedure Act except in cases where the court of law can do complete justice between the parties, and where a court of equity would grant absolute and unconditional relief. In that case the second plea stated that the bill was a renewal of a bill accepted upon

a distinct promise by the plaintiff, that, if the defendant would pay discount at ten per cent. the plaintiff would renew from time to time until the defendant was of ability to meet the bill; that the defendant accepted the bill upon the faith of the promise, which he would not otherwise have done, and had always kept his part of the contract, but the plaintiff had broken it and had refused to renew upon the defendant's application to him to do so, and that the defendant never had been of ability to pay the bill declared on as the plaintiff always knew.

In arguing for the plaintiff the counsel said that the defendant, by the equitable plea, sought to set up a contemporaneous oral contract to vary the character of the security declared on which, though it might be the subject of a cross action, could not control or suspend the plaintiff's right. He referred to some of the cases quoted by *Mr. Cameron* as sustaining that doctrine. *Cockburn, C. J.*, said, "that will not be disputed. All those cases were before equitable pleas were allowed." As the argument advanced the Chief Justice said, "the defendant is seeking not to substitute another contract for that declared on, but to bring the real, the entire contract before the court. A court of equity would probably grant an injunction upon terms on payment of the interest for instance, and tendering a new acceptance; but that we have no power to enforce." The court refused to allow the plea even as setting up a good equitable defence, and in the case before us the plea is simply pleaded as a legal defence. We think there must be judgment for plaintiff on the demurrer.

As to the rate of interest to be allowed the plaintiffs there is nothing to shew that the money was loaned at any higher rate than the legal interest of six per cent, except under the special agreement set out in the pleas, which the plaintiffs' testator seems to have repudiated. We see no reason why he or his executors should have the benefit of the agreement as to the additional rate of interest, when the defendants are deprived of the advantage of the other portions of the agreement, viz., the extension of the time for paying the principal for three years. By enabling the plaintiffs now to recover the amount of the debt, the defendants one and all are deprived

of the important part of the agreement as to extending the time for paying that debt, which undoubtedly was the consideration for agreeing to pay so large an interest. The consideration fails, and it seems only right that the agreement should not be enforced for the excess of interest.

Per cur.—Judgment for plaintiff on demurrer and damages assessed on the demurrer to be fixed at \$1,648.

As to pleading on agreement to renew see *Innes v. Munro*, 1 Ex. 473; *Ford v. Beech*, 11 Q. B. 852. As to repudiation of contract, *Danube and Black Sea Railway and Kustendjie Harbour Company v. Xenos*, 11 C. B. N. S. 152, 5 L. T. N. S. 527, S. C. in *Exchequer*, Ch. 13 C. B. N. S. 825. Excuse for non-performance of contract—*Jonassohn v. Young*, 11 W. Rep. 962—delivery of coals; *Hoare v. Rennie*, 5 H. & N. 19. As to waiver—*Simpson v. Dendy*, 8 C. B. N. S. 435; *Cort v. Ambergate, Nottingham and Boston and Eastern Junction Railway Company*, 17 Q. B. 127; *Hochster v. De LaTour*, 2 E. & B. 678; *Avery v. Bowden*, 5 E. & B. 714, 6 E. & B. 953; *Riply v. McClure*, 4 Ex. 345; *Esposito v. Bowden*, 4 E. & B. 963; in error, 7 E. & B. 763; *Emmens v. Elderton*, 4 H. of L. Cases, 624, 13 C. B. 495, when employment put an end to, immediate right of action exists.

DATE V. THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Declaration—Counts in—Form of—Demurrer—Policy of Assurance—Two properties contained in—One of which is under mortgage—Con. Stat. U. C. ch. 52, ss. 27, 67.

Declaration stated that by policy dated 29th May, 1861, the defendants insured plaintiff against loss by fire in the sum of \$1,200 on stock of hardware, &c., contained in a frame building situate on the west side of Water-street in Galt, at 20 per cent., and also that by policy of 28th June, 1861, defendants insured plaintiff on stock of hardware, &c., in a building situate on the west side of Water-street in Galt, to the amount of \$1,200 at 20 per cent. On his two story dwelling house, &c., situated on the east side of Hunter-street, \$800, and on household furniture contained therein \$800 at 5 per cent., making in all \$2,800, and averred that from the making of the policies the plaintiff was interested in the premises and stock till the time of the fire, when he sustained a loss of \$6,000, and averment that all things necessary had been performed by plaintiff to entitle him to bring this action.

The 5th plea averred that as to the second policy, at the date thereof, the stone dwelling house, &c., mentioned therein, was under mortgage to one W. D., and that plaintiff gave no notice thereof to the defendants, nor procured said mortgage to be noticed in the policy as required by law, &c., whereby said policy is void.

To which plea plaintiff demurred, and assigned as causes of objection that the said second policy is divisible, &c., and that a mortgage on said dwelling house does not affect plaintiff's right to recover in respect of the stock, &c.; that said plea confesses and does not avoid plaintiff's cause of action.

The defendants excepted to *first* count of declaration that plaintiff did not allege therein that he was interested in the stock, &c., at the time of loss or at any other time, or that said stock was at any time injured or destroyed by fire, nor did it allege any breach of duty by defendants.

Held, 1st. That the declaration framed as above must be considered as containing two counts, and that the same is good in form, as the general allegation at the end thereof must be considered as referring to the whole declaration.

2nd. That when a policy covers two or more distinct properties, each of which is insured thereby for a specific sum and at a fixed rate respectively, the said policy must be considered as divisible, and therefore the fact of one of said properties having, at the date of the policy, been under mortgage, whereby the assured had an estate therein lesser than a fee simple, or said property was encumbered, does not affect the right of the assured to recover against the insurers in respect of the other properties mentioned in the policy, though no notice had been given to the insurance company at the time of application of one of such properties being under mortgage, and though no notice was by plaintiff procured to be made of such mortgage in said policy as required by ch. 52, Con. Stat. U. C., ss. 27, 67.

The declaration stated that the defendants, by a policy of the 29th of May, 1861, duly executed, and reciting in the usual manner the consideration for the defendants as a mutual company insuring to the plaintiff, insured unto the plaintiff the sum of \$1,200 on his general stock of hardware, tools, finished and unfinished, contained in his framed and plastered building situate on the west side of Water-street, at 20 per cent.; and also for that the defendants, by a policy of the 28th of June, 1861, duly executed, and reciting, &c., insured to the plaintiff on his general stock of hardware, tools, finished and unfinished, contained in his framed and plastered building situate on the west side of Water-street, the sum of \$1,200 at 20 per cent. On his two story stone dwelling house, with framed kitchen attached, situate on the east side of Hunter-street, \$800, and on his household furniture contained therein, including linen, &c., \$800, at 5 per cent., making \$2,800 in all. The declaration then concluded to the effect following: And the plaintiff says that at the times of making the said *policies of insurance* until the loss, he was interested in the said insured premises and stock of hardware in the said *poli-*

cies mentioned to a large amount, to wit, the amount of \$6,000, and that the stock of hardware in the said building, in the said policies mentioned, was, on the 13th of August, 1863, whilst the policies were in full force, burned, damaged and destroyed by fire, whereby the plaintiff then sustained damage to the amount of, to wit, \$6,000, and although all matters and things have been done by the plaintiff to entitle him to recover the amount of the said policies, and to maintain the suit, &c., yet the defendants have not paid the plaintiff.

The fifth plea was as to so much of the claim as arose in respect of the second of the said policies in the declaration mentioned; that prior to the effecting of the second policy the plaintiff, by indenture by way of mortgage, on the 20th of February, 1860, conveyed the stone dwelling house in the said policy mentioned, together with the land whereon the same is situated, along with other lands, to one William L. Deslin, his heirs and assigns, to secure the payment of £6,500 and to indemnify Deslin against certain liabilities incurred for the plaintiff to the amount of £1,500; and although the mortgage was in existence undischarged and unpaid, and in full force as an incumbrance on the said stone dwelling house of the plaintiff from the time of the execution thereof up to and subsequently to the effecting of the last mentioned policy, to wit, hitherto, yet the plaintiff in his application for the last policy, neglected to set forth such mortgage though particularly interrogated with respect to incumbrances thereon, and neglected to procure the same to be noticed in the said policy, and the same was not expressed therein or in the application therefor as prescribed by law in that behalf, whereby the said policy was and is void.

The plaintiff has demurred to the fifth plea, and assigned the following causes of objection to it: that the contract contained in the second policy is divisible, the consideration for each branch of it being distinct and that a mortgage on the dwelling house does not affect and forms no defence to the plaintiff's right to recover in respect of the goods in the frame building; and that the fifth plea confesses without avoiding the plaintiff's cause of action.

The defendants have given notice of exception to the *first count* of the declaration. That although the declaration consists of two distinct counts, yet it is not alleged in the first count therein that the plaintiff was interested in the goods and chattels therein mentioned, either at the time of the alleged loss by fire or at any other time, or that the said goods and chattels were at any time during the period the policies were in force, or at any other time, consumed or destroyed or injured by fire. Nor does the *first count* allege any breach of duty whatever on the part of the defendants.

Freeman, Q. C., for the demurrer. If the declaration consists of only a single count, all the matters excepted to as not being contained in what the defendants call the *first count* are in fact contained in it; and if the declaration consists of two counts, then either the defendants' exceptions to the first count are not available to them, because they are not in the line of demurrer, as has been suggested as the plea which is demurred to and which gives the defendants the right to fall back upon the declaration is pleaded only to the second count, or else they are not true in fact, because such matters are, as they may be, made applicable to the first count, although they are contained in the second count; that an insurance of \$1,200 in hardware, for which a consideration is paid of 20 per cent. although the plaintiff has also insured in the same policy for \$800 on a stone building in which the hardware is *not* placed, and for \$800 on the furniture *in* the stone house, the two latter sums being at 5 per cent., cannot be defeated entirely because for some reason the insurance of \$800 upon the stone house is not binding upon the defendants; that as to the hardware which is situated in a wholly different building from the stone house, the plaintiff must be entitled to recover, although it might be held he was not entitled to recover for the furniture which was contained in the dwelling house, if the claim were made for the loss of furniture. The policy must be divisible in this respect and the statute should be so construed. He referred to *The Ramsay Woollen Cloth Manufacturing Company v. The Mutual Insurance Company of the District of Johnston* 11 U. C. Q. B. 516.

R. A. Harrison, contra. The case of *Hughes v. Rees*, 4 M. & W. 204, shews the declaration consists of two counts, and if so the allegations at the end of the second count are not applicable to the first count. The Upper Canada Consolidated Statutes, chapter 52, sections 27, 67, avoid the policy altogether if the provisions of the act are not complied with. The case in 11 U. C. Q. B. 516, is a direct authority for the defendants. As to the entirety of the contract he referred to *Howden v. Haigh*, 11 A. & El. 1033; *Higgins v. Pitt*, 4 Exch. 312; *Hopkins v. Prescott*, 4 C. B. 578.

ADAM WILSON, J.—The 27th section of the act referred to enacts that, “if the assured has a title in fee simple unincumbered to the building or buildings insured, and to the land covered by the same, any policy of insurance thereon, issued by the company, &c., shall be deemed valid and binding on the company, but not otherwise; but if the assured has a less estate therein or if the premises be incumbered, the policy shall be void, unless the true title of the assured and of the incumbrance on the premises be expressed therein and in the application therefor.” The act, therefore, makes valid any policy of insurance on buildings and land covered by buildings. The expression of the act is “any policy of insurance thereon,” and the latter part of the section which declares that the *policy* shall be void if the assured has a less estate in the buildings and land, or if the premises be incumbered, should, I think, be read in the same manner as in the first branch of the section, namely, the “policy of *insurance thereon*,” shall be void if the assured has a less estate than a fee simple or has incumbered the premises and has not expressed his true title.

There is a difference between “any policy of insurance thereon,” and “the policy” generally, and the two expressions should be construed alike if they can be so construed, and I think the full purpose of the act will be answered and the contracts of the parties be more truly effectuated, by reading the clause throughout as relating to “the policy of insurance effected thereon,” rather than to the *policy* as an entire instrument, so that the objectionable part of the policy,

if there be any such part in it, may alone be avoided, and the rest of it (if otherwise valid) may stand, unless indeed the contract is so expressed and is so inseparable that if the one part of it fall the rest of it must of necessity fall too. (*Ridgeway v. Munkittrick*, 1 Dr. & War. 84.)

If an insurance were effected for a single sum upon a house and the goods in it, or upon a house and goods contained in a different house, so that it would be impossible to say how much of the amount insured was upon the house and how much upon the goods exclusively, it may be that if the insurance on the house were invalid in consequence of its having been incumbered when insured, and such fact had not been truly stated to the company, that the whole policy would be avoided. But as such a contract is not necessarily indivisible, and if it do appear that it may well be dealt with in separate clauses, that the parties have insured for distinct and independent sums on different and distinct kinds of property, and that different considerations or rates of insurance have been paid by the assured upon these distinct properties according to their nature, quality and situation, it is very difficult to say why such a contract ought not to be severally construed, and more than this, it would be very hard if such a contract could not be severally construed so long as the objection which is taken to a part does not also necessarily extend to or prejudice every part of it.

Fraud to a part would, we think, vitiate it as to the whole, but in the absence of fraud or some such general cause extending to the whole, the part which is specially affected by any ground of defence should alone be held to be invalidated when it can be impeached.

The present case is a very good illustration of the application of such a rule. The plaintiff insures his stock of hardware in a frame house on the west side of Water-street east, and also his stone dwelling house on the east of Hunter-street, both in Galt, insuring the former to the extent of \$1,200 at the rate of 20 per cent., and the latter to the amount of \$800 at the rate of 5 per cent, and yet it is said because payment of the insurance on the house cannot be enforced in consequence of the incumbrance which was upon it, of which the

company had no notice, that the insurance upon the hardware cannot be enforced either, for the same reason, and this upon the mere ground that both subjects happen to be in the same instrument of insurance, notwithstanding there is a separate insurance upon each, and a separate rate of insurance upon each also.

The two subjects of insurance are in no way connected, the hardware being in a wholly different building, which may, for what we know, be a mile apart from the stone building; or, from the defendant's argument, the two buildings may be five hundred miles asunder. If such reasoning can prevail, then an insurance which had been effected upon goods to the amount of £10,000, or any other large sum for which a heavy rate had been exacted and paid, would, if it happened to be contained in the same policy insuring a house to the extent of £50, upon which house there happened to be an unpaid mortgage to the amount of £5, which had not been communicated to the company, be wholly invalidated, although the insured had paid 20 per cent. for insuring his goods and only 1 per cent. for insuring his house. It is a very serious proposition, and if it be law it would be a fit subject for legislative correction, at the earliest possible moment.

The case of *Howden v. Haigh*, in 11 A. & E. 1033, to which *Mr. Harrison* referred is, in my opinion, a clear authority against the defendants, and more particularly the case of *Sheerman v. Thompson*, referred to in it, and contained in the same volume, 1927, and so also are the other authorities which he cited. The decision in the Queen's Bench, to which we were referred, of *The Ramsay Woollen Cloth Manufacturing Company v. The Johnstown Mutual Insurance Company*, is one which we should have been obliged to yield to if it had been upon the like facts which are presented to us here. In that case there was a double insurance on one of the different subjects of insurance, and it was held that all the subjects of insurance being in the same building, which was insured in and by the same policy, that the whole insurance was avoided by the effect and provisions of the statute. In this case the two subjects of insurance have no kind of connection with each other, and therefore the decision does not

prevent us from construing the statute, as it appears to me it ought to be in this case, against the company. As before stated I think the statute is not to be read as avoiding the whole policy. This is not its obvious meaning, and unless it be the imperative order of the legislature that it shall be so read, I think it ought not to be read in this manner, because it is not a reasonable interpretation to place upon either the act of parliament or the contract.

The cases before mentioned shew the divisibility of the contract, and when and why, and under what circumstances, and for what causes a divisibility is not allowed; and there can be no doubt that the plaintiff might have stipulated expressly for a several and divisible contract as to each of the different subjects of insurance. The question now is whether such a contract which might have been made has not in fact been made. I think it has. But there is another principle also which operates in the plaintiff's favor, and that is, that a sum specified even as *liquidated damages*, to secure the performance of acts of different degrees of importance shall be construed to be not liquidated damages but a penalty. *Kemble v. Farren*, 6 Bing. 141, and many other cases of that class between that decision and the late case of *Dimech v. Corlett*, 12 Moore, P. C. C. 199, shew this. The reason being that unless the court is compelled by the imperative and conclusive words of the parties, it will not allow too inadequate a forfeiture for the damage sustained to be recovered. In these cases the total forfeiture is claimed by the plaintiff, who seeks to recover the entire sum for perhaps a very minute breach of engagement; in this case the forfeiture is claimed by the defendants of the whole contract when only a partial, and particular, divisible, and very trifling breach of duty is chargeable against the plaintiff, and when such failure of duty relates to a distinct subject of contract, and is founded on a wholly different consideration from that for which this action is brought. It may be said that as the liability of the insured to the company is upon the note which he gives, and as this note is in and for a single sum, not specifying separately the different constituent rates which made its total; that there cannot be a recovery for the good part, if the bad part of the

policy is to be struck out, because the note is not divisible in its nature ; but this is not so, for the note may be good in part although bad in part, and the good part may be recovered as a distinct demand, apart from the rest of it. *Sheerman v. Thompson*, before mentioned, and *Forman v. Wright*, 11 C. B. 488.

If it had appeared from the declaration that the policy had declared that the property incumbered should stand pledged to the company for the whole amount of the premium note or policy, according to section 67 of the act, it may be that the incumbrance of the one property would vitiate the entire policy, and that the policy could not be treated as divisible ; but it does not appear from the record that this is the provision or effect of the present policy, and upon this therefore we express no opinion.

With respect to the exception to the form of the declaration it is either one count or two counts. If the former, the exception is not true in fact ; if the latter, the exception cannot be entertained, because what is called the first count is not, in the line of the pleadings, affected by the demurrer.

I think, from the frame of this declaration, that it consists of two counts. See the form in *Roberts v. Tayler*, 1 C. B. 117. It is not necessary to pursue the subject of how much must be alleged in each count, or what averments appearing on the whole record will answer severally the different parts of the record, for the proceedings on the common counts, where the different claims are set forth, with a single breach and promise, shew there is no peculiar principle of pleading involved in the form adopted in this case.

Lee v. Edwards, 1 Ventris, 44, is a case somewhat similar to the present, excepting that in that case the plaintiff averred generally, at the end of the second count that, " he had cured accordingly," which cure being the consideration in each count it was contended was insufficiently laid to the first count, it was however held sufficient in these days of stringent pleading to be well enough after verdict, we think it would be held well enough now before verdict ; at any rate in that case it did not allege that the plaintiff had performed the said *respective* cures, while here the averments are throughout as to the said *several* policies.

If there can be a reference from one count to another (Ch. on Pl. 6 edn. 413) we do not see why it may not be in the first to the second, as in the second to the first, nor do we see why, at the end of both counts, the plaintiff might not there allege that he had performed everything in the first count mentioned, or make any other averment as to that count in that particular part of his declaration, and then why he might not follow the like necessary averments as to the second count. The question would be at all times upon general demurrer, whether enough appeared upon the whole record to entitle the plaintiff to judgment.

I am of opinion the declaration is good in form, but if it were not, that the objection taken is not now properly before us in this demurrer, and that there should be judgment for the plaintiff on the demurrer to the fifth plea.

Per cur.—Judgment for plaintiff on demurrer.

MINGAYE V. CORBETT.

Writ of execution—Sale of goods by sheriff thereunder—Memorandum in writing or delivery necessary—17 section Statute of Frauds.

Held, that a sale of goods and chattels by a sheriff, under a writ of execution, comes within the 17th section of the Statute of Frauds, and requires a memorandum in writing or a delivery of the goods sold to bind the sale. And in this case, where the purchaser merely signed a memorandum in a book acknowledging the amount of his bid for goods sold by the defendant and no memorandum was signed by the auctioneer, it was held insufficient to entitle the plaintiff to bring this action against the defendant for refusing to complete the sale.

This was an action brought by the plaintiff against the defendant, sheriff of the united counties of Frontenac, Lennox and Addington. The declaration contained three counts.

The first charged that the defendant, as sheriff, by virtue of certain writs of execution against the goods of one Ockley, seized his goods, to the value of \$3,000, according to an inventory or price list, made by the defendant upon the seizure, and sold them to the plaintiff at 13s. in the £ on the prices mentioned in the inventory, and although the plaintiff was ready and willing to pay the defendant yet he wrongfully, under color of the said writs, sold the goods a second time to one Hugh Fraser.

The second count charged that the defendant, as such sheriff, by virtue of certain writs of execution against the goods of Ockley, seized his goods and exposed them for sale by public auction, and at the sale sold to the plaintiff, who bought of the defendant, as such sheriff, the goods consisting of tea, sugar, wine, spirits, groceries and furniture, at the price of \$2,000, to be paid for on delivery; that the plaintiff did every thing to entitle him to the delivery of the goods, yet the defendant did not deliver them whereby plaintiff was deprived of the profits which would have accrued to him.

The third count charged that defendant converted to his own use, and wrongfully deprived the plaintiff of the same goods.

The defendant pleaded first to the first and second counts, that he did not sell the said goods to the plaintiff.

Second plea to the first count, that after the sale defendant was always ready and willing to deliver the goods, on payment of the purchase money, of which plaintiff had notice, yet the plaintiff neglected and refused to accept the goods and pay for them, therefore after notice, and after a reasonable time had elapsed, the defendant annulled the sale and re-sold the goods to Hugh Fraser.

Third plea to second count—That immediately after the alleged sale mentioned in that count, the defendant was ready and willing to deliver the goods to the plaintiff on payment of the price thereof, but the plaintiff neglected and refused to accept of the goods and pay for them.

Fourth plea to the first and third counts—Not guilty.

Fifth plea to third count—The goods were not the plaintiff's as alleged.

The cause was brought to trial at the assizes held at Kingston in the spring of 1864, before *Adam Wilson, J.*

The evidence was, that the goods had been put up for sale three times. At the first sale which took place on the 28th of March, 1862, the goods were offered on four executions against Ockley. The first was the plaintiffs; the second Elizabeth Ockley; the third Mary Ockley; the fourth Samuel Garner, and bid off at 22s. 9d. in the £. This sale was not carried out. Before the second sale Hugh Fraser had also an

execution against the goods of Ockley, and he claimed that his was entitled to priority by reason of the others being fraudulent as against him, of which he had given the sheriff notice.

There was a memorandum in the auctioneer's book as follows :

“ Kingston, April 2nd, 1862.

Postponed sheriff's sale at Mr. Robert Ockley's, Princess-street, from Wednesday the 28th of March. The stock to be sold “ *en bloc*,” at so much in the pound. I hereby acknowledge having bid the sum of eight shillings in the pound on the above stock.

(Signed,) HUGH FRASER.”

Then followed fourteen bids, signed by the bidders, at rates from 8s. to 12s. 6d. The plaintiff was the last bidder at 13s. and signed his bid “ W. R. Mingaye.” The auctioneer did not sign the memorandum for the sheriff, nor did the sheriff himself, and there was no other writing or written memorandum of the sale.

At the second sale which took place on the 2nd day of April, 1862, the plaintiff was the purchaser of the goods in the sheriff's inventory at thirteen shillings in the pound of the prices therein mentioned. The plaintiff proposed to the sheriff to take credit for his own execution, and pay the balance between it and the amount of his purchase. The sheriff declined to do this, but offered to deliver the goods on payment of the purchase money. On the same day the plaintiff procured an assignment to himself of the judgments and executions of Elizabeth and Mary Ockley, and proposed to the sheriff to take credit for his own and the amount of these executions, and to pay the balance, but the sheriff refused and insisted on being paid the money.

After the sale to plaintiff the auctioneer went with the sheriff to the plaintiff's office to carry out the sale, but it fell through for the reasons above stated.

On the 17th of April, 1862, the goods were sold a third time to Hugh Fraser at 10s. 9d. in the pound. The sheriff employed an auctioneer to sell the goods for him, and the sale was announced as a cash sale.

At the close of the plaintiff's case, *O'Reilly*, for the defendant, moved for a nonsuit: 1st. Because no contract was proved which is binding in law. The party charged with the default has signed no writing. 2ndly. Because no legal tender of the purchase money was made. 3rdly. Because the plaintiff refused to pay the money and to carry out the conditions of the sale.

Sir H. Smith, Q. C., for the plaintiff—1st. The plaintiff had the right to deduct his own execution from the amount of his purchase. *Sewell on Sheriff*, 253; *Champion v. Plumber*, 1 B. & P. N. R. 253; *Leader v. Danvers*, 1 B. & P. 359; *Bac. Ab. Execution*, 2 C. 4; *Smallcomb v. Buckingham*, Salk. 320; S. C., 5 Mod. 376. 2ndly. Sheriff sales are not within the Statute of Frauds. 3rd. That contract of sale is sufficient.

The learned judge did not decide these questions, but he intimated his then opinion that there was no sufficient contract, but ruled for the plaintiff giving the defendant leave to move to enter a nonsuit, if the court should be in his favor.

The defendant proved that a notice had been served on him on the 1st of April, 1864, that Mr. Mowatt, the attorney for the plaintiff Fraser, against Ockley, had told him (the sheriff) that the prior executions would be contested; that he should sell for cash and get the money and pay it into court, and let the parties get it by an interpleader order.

Hugh Fraser, on the part of the defendant, was called and said he was a creditor of Ockley to the amount of £400; that he had bought the goods at 10s. 9d. in the pound, and paid for them \$1517 75, and realized about \$1,100 from their sale; that the liquors for which he gave about £100 he had sold for about £10. On his cross-examination he admitted he had bid 22s. 9d. in the pound for them.

Alex. Fraser said the goods bought by Hugh Fraser were not worth what he gave for them. The liquors were bad; he could not offer them to any of their customers; the stock was not good, and was made up of odds and ends.

John King said he had charge of the goods for the sheriff; that stock was taken fairly; that he delivered to Fraser the goods he bought and had the liquors gauged.

The learned judge charged the jury to assume there was a binding contract for the sale of the goods, and he said, if the contract was a valid one there was evidence that the defendant did sell the goods to the plaintiff. He also told the jury that whether the second plea was proved or not depended upon whether the sheriff declined to allow the amount of the plaintiff's execution, and those assigned to him on his purchase, by having good reason to believe, and believing that these executions were *bona fide* disputed on the grounds of their being invalid as against the execution of Fraser. That if they found he acted in this belief then they ought to find the issue raised by second plea for the defendant. If the goods were not worth 13s. in the pound, as sworn to by the defendants, then their verdict ought to be for 1s. damages; but if they were worth more than 13s. then the difference between that and what they were worth would be the measure of the plaintiff's damages.

The jury found for the plaintiff on the first and fourth issues, and for the defendant on the other issues, and assessed no damages.

McLennan, for the defendant, obtained a rule in Easter Term, calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered pursuant to leave reserved, on the grounds that no valid sale of the goods and chattels to the plaintiff, within the Statute of Frauds, was proved, and there was no evidence of such a sale.

During the same term *Sir H. Smith*, Q. C., for the plaintiff, obtained a rule calling upon the defendant to shew cause why the verdict should not be set aside and a new trial granted on the grounds—1st. That the verdict for the defendant on all the issues, except the first and fourth, is contrary to law and evidence, and against the weight of evidence, and for the improper reception of evidence in this, that the learned judge improperly allowed evidence to be submitted to the jury to the effect that the person who purchased the goods after the sale to the plaintiff, had not made a profit on the transaction, without stating that in fact the goods were not of more value than the amount bid for them, which circumstance had no bearing on the plaintiff's right to recover in this action, nor

upon the measure of his damages, unless the actual value of the goods had been shewn to be less than the price at which the plaintiff bought them.

2ndly. That especially the verdict on the second issue being the second plea to the first count, should have been for the plaintiff, as it appeared at the trial that the plaintiff was ready and offered to pay all the purchase money of the goods to which defendant was entitled, and the defendant had no authority or right to annul the sale; that the verdict for the defendant therefore on the second plea was contrary to law, evidence, and the judges charge; that the plaintiff was also entitled to recover on the fifth issue, as that sale passed the title in the goods to the plaintiff, subject to the defendant's lien for the unpaid purchase money, and that as the plaintiff was always willing and offered to pay the defendant the purchase money to which he was entitled, the plaintiff had a right to recover on the said fifth issue for the full value of the goods; that the finding of the jury on the first and fourth issues entitles the plaintiff to recover substantial damages, and that while the finding of the jury upon those issues is for the plaintiff, no damages are awarded; that the plaintiff was entitled to a verdict under the evidence adduced for him on the issue raised to the second count of the declaration by the third plea of the defendant; that the finding of the jury upon the several issues is unreasonable and inconsistent.

In Trinity Term both rules were argued by *R. A. Harrison* for the plaintiff, and *McLennan* for defendant.

Harrison shewed cause to defendant's sale and contended that the sale vested the goods in the plaintiff, and that a sheriff's sale is not within the Statute of Frauds. He cited *Attorney General v. Day*, 1 Ves. senr. 218-20; *Blagden v. Bradbear*, 12 Ves. 466; *Haydon v. Crawford*, 3 U. C. O. S. 583-7-8; *Hernaman et al. v. Bowker*, 11 Ex. 760; *Sarl v. Bourdillon*, 2 Jurist N. S. 1208. In support of the plaintiff's rule he cited many cases in support of the positions assumed in it, but as the case turns on the point raised by defendant's rule, this branch of the case has not been considered.

McLennan, in support of defendant's rule, contended that a sheriff's sale is within the 17 section of the Statute of Frauds. He cited *Witham v. Smith*, 5 Grant's Ch. Rep. 203; *Watson on Sheriff*, 252-269; *Taylor v. Cole*, 3 T. R. 292; *Palmer's case*, 4 Rep. 74; *Palmer v. Humphrey*, Cro. Eliz. 584; *Barmard v. Leigh*, 1 Starkie, 43. He contended the sheriff was bound to sell for cash. *Ex parte Tatham In re Shepherd*, 1 M. & Ay. 335; *Ex parte Stephens*, 2 do. 32; *Ex parte Wilson In re Maltby*, M. & Ch. 110.

JOHN WILSON, J.—In this case the sheriff offered a stock of goods exceeding in value £10 sterling. The plaintiff bid for them 13s. in the pound of their value, and signed a memorandum of his bid, but the sheriff made no written memorandum of the sale signed by him, nor did he deliver any part of the goods. The defendant contends that this sale is within the 17 sec. of 29 Ch. 2, Ch. 3, and relies on the case of *Witham v. Smith*, 5 Grant, 203, as expressly in point. In that case the defendant Smith, sheriff of the county of Brant, had sold to Witham, by public auction, an unexpired term in a lease, and also certain trade fixtures in a shop, but after the sale, and before any thing further was done, the debtor and execution creditor settled, and requested the sheriff not to complete the sale, and he thereupon refused to complete it. Witham, the purchaser at auction, filed his bill against Smith for a specific performance of the contract. Spragge, Vice-Chancellor, said, "such a contract as the one sought to be enforced must be in writing under the Statute of Frauds, and its being on a sheriff's sale appears to form no exception." In the contract put in there is no signature by or on behalf of any one as vendor, and this is a bill against a vendor.

No English case has been cited during the argument expressly in point. *Doe Hughes v. Jones*, 9 M. & W. 372, is a case which shows that a public sale by a sheriff, of a lease, is a case within the third section of that statute. There, one Wright, the owner of the premises in question, had leased them to the lessor of the plaintiff for fourteen years at a rent payable half yearly. The plaintiff had occupied and paid rent up to the year 1839, when a *fi. fa.* at the suit of the

defendant was put into the sheriff's hands under which the goods and lease of the plaintiff were taken in execution and sold by the sheriff. The defendant became the purchaser of the lease, which was handed over to him, and he entered and paid rent to the owner, but no assignment in writing, of the lease, had been made by the sheriff to the defendant. It was contended that there was an assignment by act and operation of law, but the court held the sale within the statute, and the plaintiff recovered. Lord Abinger said, "here something is to be done by the sheriff before the title of the execution creditor is divested out of him, or that of the purchaser is completed; namely, an assignment of the lease. Now, if a sheriff is bound to execute such an instrument, ought he not to do it in compliance with the established rules of law? In order to give a title to the property, he must find a specific person to assign it to, and give that person an assignment in writing according to the express words of the Statute of Frauds." Alderson, B., was of the same opinion. He said, "a parol assignment by a sheriff is open to all the evils of a parol assignment of property by any one else; parties would be setting up claims to property under pretence of such assignments; and the object of the statute, which was to prevent such practices and the numerous perjuries and frauds resulting therefrom, would be entirely defeated." An observation of Alderson, B., in this judgment, has been referred to, namely, that, in *Giles v. Grover* he had said, that the transfer of the property was consummated by the act of sale, and it was contended that the sale in this case to Mingaye transferred the property. This is true, but the act of sale was not consummated. There was something to be done which was not done. In the case of *Giles v. Grover*, 9 Bing. 176, it is said by Taunton, J., "it is so clearly laid down in all the text books as a general proposition, that the property in goods is not altered but continues in the defendant until execution is executed, that it cannot be necessary to say much on that point. But then a question arises, when is execution executed, that is, completed? It would seem from the language of the writ of *feri facias*, that the sheriff has not completed the whole of his

duty under the writ until he has converted the goods and chattels seized into money, for the writ enjoins him that of the goods and chattels of the defendant he cause to be *made* so much money; and he is further enjoined, that he have that *money* before the King at Westminster on the return day, to be rendered to the plaintiff, so that the selling or making the goods into money appears to be a most essential part of the sheriff's duty." In *Smith v. Bacon*, 14 U. C. Q. B. 38, the plaintiff, as sheriff of Brant, sought to recover damages against Bacon for breach of a contract, on a sale of goods, under circumstances in some respects like this case. The plaintiff, as sheriff of Brant, had an execution against the goods of one Morgan, and on it seized his stock of goods, and put up the entire stock to be sold in one lot, and the bidding was at so much in the pound upon the costs, as ascertained by a stock book, and a credit was to be given of six, nine, twelve and fifteen months, upon the purchaser furnishing certain notes. The court held this mode of sale bad, although there the defendant had signed his bid of 13s. 9d. in the pound, and the defendant had judgment. Burns, J., in his judgment, said, "take the ordinary case of sheriff's sale—if a purchaser do not pay the amount of his bid the sheriff may at once expose the goods again, and deliver to the person who pays, or agrees to pay him." Suppose the sheriff, after such a contract as stated, were to say to the defendant he would not carry it out, but would sell the goods in the ordinary way, could the defendant maintain an action against the sheriff for breach of the contract? It does not appear to me the defendant would, in such case, have any cause of action against the sheriff."

If an assignment in writing of a lease, sold by a sheriff, must be in writing to take it out of the third section of the Statute of Frauds, we see no reason why a sale of goods for the price of ten pounds sterling and upwards, by a sheriff, should be good without some note or memorandum in writing of the bargain made and signed by the party to be charged by such contract, in accordance with the seventeenth section of the statute.

We think the case clearly within the statute. The defendant's rule for a nonsuit will be made absolute with costs. This renders it unnecessary for us to give any opinion on the points raised by the plaintiff's rule.

Per cur.—Rule absolute for nonsuit.

GORDON ET AL. V. ROBINSON.

Pleading—Cause of action set up as a defence in former action—Demurrer—Estoppel—How far conclusive before judgment.

Action on a contract to make and deliver tweeds of a good merchantable quality. Plea, that the plaintiff ought not to prosecute this action, because before the commencement of this suit the now defendant impleaded the now plaintiff for the price of the goods, in declaration mentioned, and the now plaintiff paid into court \$187 53, and, as to residue, pleaded "never indebted," whereupon issue was joined, and at the trial of said issue the now plaintiff gave in evidence that the goods were not of a merchantable quality, fit for sale, and the judge told the jury if they were not of a good merchantable quality, this should be taken into their consideration in reduction of damages, and thereupon the jury gave a verdict for the now defendant for \$1,697.

Demurrer to plea on grounds that the matters alleged in declaration could not have been given in evidence in defence of the former action; that it did not appear from the plea that the jury pronounced any verdict with reference to the deductions claimed; that it did not appear whether the now defendant had recovered judgment for any thing claimed by him.

Held, that where goods are sold with warranty, or supplied according to contract, it is competent for the defendant to defend himself, by shewing how much less the subject matter of the contract is worth by reason of the breach of contract, and to the extent he obtains an abatement from the price he is considered as having received satisfaction for the breach of contract, and so far is precluded from recovering in another action. That the plea shewed sufficiently that the subject matter complained of herein, was submitted to the jury in the former action, in abatement of the price to be allowed the plaintiff in that action, and that they found for the plaintiff. That if the now plaintiffs were allowed damages in the former action, in abatement of the price of the cloth, they would be precluded from recovering them again; and that if they were not allowed them, because the cloth was not inferior, it was likewise against public policy that the matter should be again litigated.

Held, also, that the claim for loss of profits, which could not have been considered in the other action, was not laid in the declaration as a substantive ground of action, but introduced incidentally at its conclusion.

Held, further, that the verdict in the former action was not conclusive until it had proceeded to judgment, and therefore plaintiff was not precluded from maintaining this action.

The first count of the declaration alleged that the plaintiffs were wholesale merchants at Toronto, in Canada, dealing in and selling tweed cloths and other goods, which they were accustomed to buy of manufacturers of such goods, and the defendant

was a manufacturer of such goods at Galt, in Canada, and the defendant agreed with the plaintiffs that in consideration that the plaintiffs would buy of the defendant, to wit, 2,504 yards of tweed cloth, to be manufactured by the defendant, and would agree to pay the defendant a certain price therefor, to wit, 75 cents per yard, the defendant undertook to manufacture, sell and deliver to the plaintiffs such quantity of such goods of a good and merchantable quality; and that although the defendant did manufacture, sell and deliver the said goods to the plaintiffs on the terms aforesaid, yet the said goods were not of a good and merchantable quality.

The second count alleged that the plaintiffs, being such wholesale merchants, and the defendant such manufacturer, as in the first count mentioned, at the places in said first count mentioned respectively, the defendant having notice of the premises, agreed with the plaintiffs that in consideration that the plaintiffs would buy of the defendant, to wit, 2,504 yards of tweed cloth to be manufactured by the defendant, and would agree to pay the defendant a certain price therefor, to wit, 75 cents per yard, the defendant undertook to manufacture, sell and deliver to the plaintiffs such quantity of goods well and sufficiently made and reasonably fit for the purpose of sale by the plaintiffs as such wholesale merchants, and the plaintiffs say that although the defendant did manufacture, sell and deliver the said goods to the plaintiffs on the terms aforesaid, yet the said goods were badly and insufficiently made, and were not goods reasonably fit for the purpose of sale by the plaintiffs as such wholesale merchants, which said defendant well knew.

Third plea to the said first and second counts: That the plaintiffs ought not further to maintain their action in respect of the alleged breaches of contract in those counts mentioned, because the defendant says that before the commencement of this suit the defendant impleaded the plaintiffs in an action on promises in the Court of Queen's Bench, at Toronto, and declared therein for money payable by the now plaintiffs to the defendant for goods bargained and sold by the now defendant to the now plaintiffs at their request, and for goods sold and delivered by the now defendant to the now

plaintiffs at their request, and for work done and materials provided by the now defendant to the now plaintiffs at their request, and for money found to be due from the now plaintiffs to the now defendant on accounts stated between them, and for interest upon and for the forbearance at interest by the now defendant to the now plaintiffs' at their request of moneys due and owing from the now plaintiffs to the now defendant, and the now defendant claimed from the now plaintiffs the sum of seven hundred pounds, and by the said action the now defendant sought to recover from the plaintiffs the price and value of the said goods in the said first and second counts mentioned, and the defendant further says that the plaintiffs pleaded to the said action, and as to the sum of one hundred and eighty-seven dollars and fifty-three cents, parcel of the moneys claimed by the now defendant, paid the sum of one hundred and eighty-seven dollars and fifty-three cents into court, and as to the residue of the declaration pleaded, that the now plaintiffs were never indebted as alleged, upon which pleas the now plaintiff took issue. The defendant further says that afterwards the said issues, so joined, came on in due and regular form of law, to be tried before Mr. Justice *Hagarty*, at the assizes held at Berlin, in and for the county of Waterloo, in the month of November last, and the same issues were then tried in due course of law by a jury of the county, duly summoned and sworn in that behalf, and the defendant further says that at the said trial he duly proved and gave in evidence the agreement between the defendant and the plaintiffs, for the manufacture and delivery of the said goods, which is the same agreement mentioned in the said first and second counts, and proved also the delivery by the defendant to the plaintiffs of the said goods, pursuant to the said agreement, and the now plaintiffs, at the said trial, produced witnesses and gave in evidence of the alleged defence, and in answer to the said causes of action of him, the now defendant. And the now plaintiff insisted and gave evidence at the said trial that the said goods, in the said first count mentioned, were not of a good or merchantable quality, and that the said goods, in the said second count mentioned, were not well or sufficiently made nor reasonably fit for the purpose of sale by the plain-

tiffs as such wholesale merchants as aforesaid. And the now defendant gave evidence at the said trial, that the said goods respectively were of good and merchantable quality and were well and sufficiently made, and reasonably fit for the purpose of sale by the plaintiffs as such wholesale merchants as aforesaid, and the now plaintiffs insisted at the said trial that if the jury were of opinion and found that the now plaintiffs were entitled to any compensation or damages in respect of the said alleged defects in the said goods, and alleged breaches of contract, they, the said jury, should make an allowance for the same and deduct the amount of such allowance from their verdict if they should find a verdict for the now defendant. And the defendant further says that the said Mr. Justice *Hagarty*, in summing up the evidence at the said trial, stated to and directed the jury, amongst other things, that if the jury found and were of opinion that the said goods respectively were not of good and merchantable quality, and were not well and sufficiently made, and reasonably fit for the purpose of sale as aforesaid, they should ascertain and decide what was the amount of compensation or allowance to which the now plaintiffs were entitled by reason thereof, and should deduct the amount of such compensation or allowance from the price or value of said goods according to the agreement for same, and find their verdict for the now defendant for the difference only, and the defendant further says that the said jury then found the said issues, so joined, in favor of the now defendant, and assessed his damages on occasion of the premises in the said action, besides his costs and charges, at the sum of sixteen hundred and ninety-seven dollars, and the defendant, in fact, says that the said alleged breaches of contract by the now defendant, alleged in the said first and second counts, are the same identical breaches of contract so alleged by the now plaintiffs at the said trial, and that the now plaintiffs have not sustained any damages in respect of the premises, that evidence was not given of in that action. Wherefore the defendant prays judgment, whether the plaintiffs ought further to maintain their action against him.

The plaintiffs demurred to this plea on the following grounds :

1. That the said plea alleged that the said plaintiffs, at the said trial, produced and gave in evidence, the special matters therein mentioned in support of their alleged defence, namely, the pleas in said action, and in answer to the causes of action of the defendant in this action, the plaintiffs in said action in said plea referred to, whereas the said matters could not have been given in evidence in defence of said action or to the said causes of action, and would form no defence thereto.

2. Because it does not appear from said plea that the jury in said action did any thing more than find the issues joined therein in favor of said plaintiff in said action.

3. Because it does not appear whether or not the jury, in said action, pronounced any verdict in or with reference to the said deductions claimed and referred to in said plea.

4. Because it does not appear by said plea whether or not the plaintiff, in said action, has ever recovered judgment for any sum claimed by him in said action.

5. Because the said plea, for anything therein appearing, is but a plea to damages, and forms no estoppel to the plaintiffs' suing for the causes of action in the counts to which the same is pleaded.

The defendant joined in demurrer.

D. B. Read, Q. C., in support of the demurrer, contended that it was not pleaded that the matters were given in evidence in reduction or abatement of damages, but in bar of that action. He also urged that it was not stated in the plea that the jury made any allowance to the defendants, the now plaintiffs, or found on the matter in any way. He also contended that the plaintiffs in this action might recover damages for loss of profits on the re-sale of the goods, and that that could not have been allowed them in the other action, and therefore the plea would be bad as not covering such part of the cause of action. He referred to *Manny v. Harris*, 2 Johnston's Reports, 30; *McGuinty v. Herrick*, 5 Wendall, 241; *Phincy v. Earle*, 9 Johnson, 352; *Mondel v. Steel*, 8 M. & W. 858.

J. B. Read, contra, contended that if the matter was raised by the now plaintiffs as a defence to the former action, and the verdict was found against them, they are estopped from

bringing this action, and if the matter set up in the plea was brought before the jury and submitted to their consideration, and after that they gave a verdict, it would be presumed they did decide upon it, and if so plaintiffs are equally estopped. That the matter could be set up by way of defence in the action brought to recover the value of the cloth he felt was fully supported by the authorities referred to in *Mayne on Damages*, 42, and was so expressly decided in *Mondel v. Steel*, 8 M. & W. 858. He referred to *Eastmure v. Laws*, 5 Bing. N. C. 444, as shewing when there was a plea of set off on the record, and the jury found on it, though in fact no evidence had been given under the plea, and nothing had been allowed to the party under it, yet it was a good answer to a recovery in a future action for the same subject matter as that contained in the plea of set off. He urged that *a fortiori* it must be a more complete bar here where it had actually been considered by the jury. He referred also to the *Dutchess of Kingston's Case*, 2 Smith's Leading Cases, 642.

RICHARDS, C. J.—In *Mondel v. Steel*, Baron Parke said, “It must however be considered, that in all these cases of goods sold and delivered, with a warranty, and work and labour, as well as the case of goods to be supplied according to contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of these, not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject matter of the action was worth, by reason of the breach of contract; and to the extent he obtains, or is capable of obtaining an abatement of price, on that account he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent.”

We think the defendant's plea demurred to sufficiently shews that, the subject matter complained of in the first and second count of the declaration, was submitted to the jury for their consideration, in abatement of the prices to be allowed to the plaintiff, in that action, for the cloth sued for, and the

jury, after having the matter brought before them and submitted to their consideration, found a verdict for the plaintiff. The jury must have allowed the now plaintiffs, by way of abatement of the price of the cloth, a sum equal to the damages they had sustained from its inferior quality, or they must have decided the quality was not inferior, and that they were not entitled to any abatement for the alleged inferiority. If the now plaintiffs were allowed damages by way of abatement of the price, they would be precluded from recovering them in another action. If they were not allowed them because the article was not inferior, and they had not sustained any damage, it is equally against public policy to allow that matter again to be litigated. *Interest Republicæ ut sit finis litium*. The following observations under this maxim, from Broom's Legal Maxims, seems to me will apply to the case before us. "If," as remarked by Lord Kenyon, C. J., "an action be brought, and the merits of the question be discussed between the parties, and a *final judgment* be obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although, perhaps some objection or argument might have been urged upon the first trial, which would have led to a different judgment. In such a case the matter in dispute has passed in *rem judicatam*, and the former decision is conclusive between the same parties if either attempts, by commencing another action, to re-open the question. If it were otherwise there would be no security for any person, and great oppression might be done under colour and pretence of law. To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous, and it is better for the general administration of justice that an inconvenience should sometimes fall upon an individual, than that the whole system of law should be overturned and endless uncertainty be introduced."

As to the objection that there is a claim in the declaration for loss of profits, which could not have been considered in the other action, it is not claimed as a substantive ground of action, as the subsequent repairs to the ship were claimed in

Mondel v. Steel, but is introduced in the conclusion of the declaration as follows: "And the plaintiffs thereby suffered great damage and became liable to pay the price so agreed upon as aforesaid, and lost all the profits which would otherwise have accrued to them."

The objection that it does not appear by the plea that judgment was ever recovered in the prior action, seems to be a formidable one. In the case referred to by *J. B. Read*, *Eastmure v. Laws*, 5 Bing. N. C. 444, the plea avers that the judgment was recovered in the prior suit in which the set off had been pleaded.

In an action for malicious arrest it is necessary to shew that the suit or proceeding in which the arrest took place is at an end. For anything that appears on the pleadings in this case, the verdict set up by the defendant may have been moved against on the ground that the jury ought not to have found against the present plaintiffs, and the rule may still be pending. It would seem strange if defendant could set up this very verdict, which may be pronounced erroneous, against plaintiffs' rightful claim. We think there must be judgment for the plaintiff on this ground, as the verdict is not conclusive until the suit has proceeded to judgment.

Per cur.—Judgment for plaintiffs on demurrer.

ORSER V. VERNON.

Ancient deed—Proper custody—Married woman's certificate—Presumption as to when 30 years old—Demand of possession.

An action of ejectment. The plaintiff claimed title from the patentee of the Crown. The defendant relied on a former deed executed in 1813 by the patentee, (a married woman,) on which was endorsed a certificate of her separate examination by Chief Justice Scott, and her consent to part with her estate therein.

Held, that an ancient deed produced by the son of the executor of the grantee of the patentee of the Crown, and proved to have been found among the testator's papers, was a proper custody in point of law to render its mere production evidence, the deed being more than 30 years old.

Held, that the deed of 1843, (under which plaintiff claimed), rather than the ancient deed, carried with it the imputation of fraud, and the production and proof of it did not necessitate the calling of the subscribing witnesses to the old deed if living, or proving their signatures if dead. As to the objection that possession of the land did not accompany the ancient deed, *held*, that there was no evidence of any adverse possession to the grantee,

and the deed having come from the proper custody untainted with fraud, and possession having gone along with it, there was no reason to impeach it on the ground that possession did not accompany the ancient deed.

That there was nothing in the evidence to warrant the suggestion that some one personated the patentee before the Chief Justice, except her own denial; and that the smallness of the consideration was a fair subject of remark to negative the truth of such a suggestion.

That the record in ejectment in a former trial substantially between the same parties, was properly admitted as evidence, and that all that could be inferred against the plaintiff's right to recover at that time, and the defendant's right to possession, were proper inferences from the production of the record.

As to the objection that no evidence was offered of the facts to which the married woman's certificate related, further than the presumptive evidence arising from its antiquity, and that the certificate itself afforded no proof of the facts certified,

Held, that from the certificate it was to be presumed, *prima facie*, that every thing was done by the judge, who made the same, to justify him in certifying what he professed to certify.

As to the objection that upon the evidence given of the acknowledgment under seal, executed by J. P., (through whom the defendant claimed,) the only verdict sustainable must be for the plaintiff,

Held, that the acknowledgment created a tenancy from month to month; and that the plaintiff could not have recovered without proof of the determination of the tenancy.

Seemle, that the judge at the trial should have prevented the plaintiff setting up a case in reply, which he did not set up at first as his case.

This was an action of ejectment to recover possession of lot number thirteen in the third concession of the township of Reach, in the county of Ontario.

The trial took place at the fall assizes for York and Peel, at Toronto, in the year 1863, before *Adam Wilson, J.*

The plaintiff, in his notice, claimed title by deed from James Eckhart, and Rebecca his wife, who was Rebecca Bowerman, the patentee, and also by a deed of confirmation from her, and also by an acknowledgment of the plaintiff's title by Isaac Playter, under whom the defendant claimed.

The defendant, besides denying the plaintiff's title, claimed title in himself and others, through whom he claimed by adverse possession, and also by deed from Nathaniel Vernon, who claimed by deed from Isaac Playter and Sarah Playter.

On the trial the plaintiff put in an exemplification of the patent to Rebecca Bowerman, and also a deed from her to him.

The defendant set up his paper title, and put in the patent, and an ancient deed dated 1813, from Rebecca Bowerman, the patentee, (a married woman,) purporting to have been acknowledged before Chief Justice Scott, who certified that

he had duly examined her touching her consent to part with her estate. The signature of Thomas Scott, C. J., to the certificate was proved.

Willett C. Dorland proved, that in 1845, after a former action of ejectment had been commenced (at the suit of Doe ex. dem Eckhart and wife v. Gilbert Orser,) against the person then in possession of the land, witness found the deed of 1813 among the papers of his father, who was the executor of the late Joseph Dorland, (the person to whom the deed of 1813 purports to have been made). He also proved the handwriting of Judah Bowerman, one of the subscribing witnesses to the deed of 1813, who, however, he swore was still living and of sound mind, although blind. No other evidence of the execution of the deed was offered. The execution of the deeds, shewing title, from Joseph Dorland to the defendant was admitted.

For the defence, on grounds of length of possession, R. Crandall said he knew the lot about thirty-six or thirty-seven years ago, about that time one Harper went on and built a log hut and lived there about two years. Molloy succeeded him. Witness said he never knew Trumpore, though Harper said he came with his authority.

Wm. Holtby said he knew the lot twenty-seven years ago, when Plevis was in possession ; Robert Benson came after him and Garrett Molloy after him ; he went into possession twenty-three years ago this fall ; Playter came after him.

At the close of the defendant's case *Gwynne*, Q. C., submitted 1st. That the paper title of the defendant failed because there was no legal evidence of the proof of the execution of the deed of 1813, from Bowerman and his wife, because one of the witnesses who was still living had not been called, and there could be no evidence given of his handwriting by another person. But if evidence of the handwriting of a witness could be given, evidence ought to be given of the handwriting of all of them.

2nd. That if the deed be sufficiently proved as to the handwriting of the witnesses, there is no proof as to the identity of the parties to the deed.

3rd. That if the deed had been duly executed and proved it was still void without the proper statutory certificate ; that

the proof of Chief Justice Scott's handwriting was no evidence that Rebecca Bowerman was the same person as the patentee of the Crown and wife of Benoni Bowerman.

4th. That the proof of the judge's handwriting is no evidence of the truth of any of the material facts contained in it, no statute making it so. The identity of the person is therefore a matter quite *dehors* the certificate, and must be established by wholly independent evidence. That the title by adverse possession is not made out because this was a wild lot when it was granted to Mrs. Bowerman, and for many years afterwards it was not shewn that she, or any one claiming under her, had knowledge of such possession by some one not claiming under her.

The learned judge ruled the objections entirely with the defendant.

M. C. Cameron, Q. C., contended that the third section of the act did not apply to the case of a person claiming under the patentee, but only to the case of a person claiming adversely to the patentee. Also, that in this case (deed or no deed) the defendant did not, according to the statute, claim adversely to the patentee, but claimed under her, and therefore the patentee stood in the same situation as any other person. That in 1843, when Mr. and Mrs. Eckhart made the first deed to the defendant, there was a discontinuance of her possession, and that the twenty years would be complete from that time before the commencement of this action.

Gwynne, Q. C., for plaintiff, then called

John S. Howard, Treasurer of the United Counties of York and Peel, who said the first entry relating to lot number thirteen, in third concession of Reach, is a payment from 1828 to 1831, made by a Mr. Hearmans, £1 12s. 6d., wild land tax. Again on the 22nd of September, 1841, paid from 1831 to July 1841, by W. Rourke, as wild land tax.

John McNabb, Clerk of the Peace of York and Peel, referred to lot thirteen in the third concession Reach, in 1843 as five cultivated and one hundred and ninety-five uncultivated, were assessed to Garrett Malloy. As appears by the assessment roll in 1841 or 1842 this lot is not upon the roll at all.

The plaintiff then put in an acknowledgment from Isaac Playter, dated the 3rd of August, 1847, in these words:

"This is to certify that we agree to give Gilbert Orser the sum of ten shillings currency per month for the use of the farm, being the south half of lot number thirteen in the third concession of Reach, Home District, for so long a time as the said Gilbert Orser may let us have it, and moreover we fully bind ourselves to give up quiet and peaceable possession to the said Orser of said farm when he may require it. As witness our hands and seals this third day of August, in the year of our Lord eighteen hundred and forty-seven."

John Watkins said, I am witness to the document under seal, dated the 3rd of August, 1847, signed by Isaac Playter and W. Playter, who, I think, is Isaac's son, to the effect that they will pay Orser ten shillings a month for the south half of the lot, and give up peaceable possession.

Rebecca Eckhart said, I never executed a deed to Joseph Dorland. Wm. Stapleton asked me if I would sign a deed of this land, but he did not say to whom; I never did sign such a deed to Joseph Dorland in my life; I have been in Kingston in my young days, but never before a judge there. I am perfectly certain I never did. Stapleton asked me, after I gave the deed to Orser, if I would execute a deed; I would not do it, as I had given a deed of it; I never heard of this deed to Dorland until after I had given one to Orser. Bowerman wanted me to make a deed to Joseph Dorland; I told him I would not, that I wanted to keep it. I never went before a judge in my life.

On cross-examination she said she did not know where the land lay till Trumpore spoke to her about it; that it was thirty-six or thirty-seven years since Trumpore came to her and said he claimed the land; that it was eighteen or nineteen years since Stapleton came about the deed; told Trumpore she meant to have the land, and he said he was going to send a man on it.

In Michaelmas Term, 27 Vic., *Gwynne*, Q. C., for the plaintiff, obtained a rule calling on the defendant to shew cause why the verdict rendered for the defendant in this cause should not be set aside, and a new trial be had between the parties for misdirection of the learned judge before whom the said cause was tried, in the following among other particulars, namely:

1st. That the learned judge charged the jury that although a certain paper writing, purporting to be a deed bearing date the 1st day of June, A.D., 1813, and produced on behalf of the defendant, was to some extent impeached by the testimony produced on behalf of the plaintiff, still it was not sufficiently impeached to require the defendant to produce any further evidence of its genuineness or execution than the presumptive evidence arising from its antiquity.

2nd. That the learned judge charged the jury that notwithstanding the matter adduced on behalf of the plaintiff, in impeachment of the said deed, still the fact of Rebecca Bowerman, the grantee of the Crown for the land in question, not having done anything with the land while she was a widow, nor until 1843, when she executed a deed to the plaintiff, was evidence to go to the jury in support of the said alleged deed and of its genuineness.

3rd. That the learned judge charged the jury that the smallness of the consideration mentioned in the said deed, which the learned judge stated would have been little more than in 1813, would have sufficed to pay the expenses attending a journey to Kingston for the purpose of due acknowledgment of the deed before a judge, afforded evidence to go to the jury against the suggestion of the plaintiff, that a person had been procured to personate the said Rebecca Bowerman before Chief Justice Scott, whose hand was set to a paper writing purporting to be a certificate of acknowledgment endorsed on the said deed.

4th. The learned judge charged the jury that on a former action of ejectment brought against one Isaac Playter in 1847, the said Playter must have shewn a better title than the said Rebecca Bowerman, and that a fair inference was that the said deed of June 1st, 1813, was the title then proved, and that it might be inferred that the said deed was then proved by the subscribing witnesses, and that all the circumstances above mentioned were matters which might properly be taken into consideration by the jury, in this action, in answer to the evidence offered by the plaintiff in impeachment of the said deed, and in support of its genuineness.

5th. That the learned judge charged the jury in relation to an instrument under the hand and seal of Isaac Playter, through

whom also the defendant claimed title, proved by the plaintiff, and bearing date the 12th day of August, 1847 ; that he (the judge) was not prepared to say that the said instrument was not obtained under duress, and as such was void, although there was no fact whatever in evidence of any such duress, and the learned judge further charged the jury, that at any rate the said instrument might have been produced upon the trial of the said action in 1847, by the plaintiffs in that action, and that it might be fairly inferred by the jury upon the trial of this action, that it either was produced upon the trial of the said former action, and that a verdict was rendered therein against it, or that it was withheld from the jury in the former action for reasons known to the plaintiffs in that action, and sufficient to satisfy them that they no merits as arising from the execution of that instrument.

6th. That the learned judge charged the jury that the said paper writing, purporting to be a deed, bearing date the 1st day of June, A.D. 1813, being found, as it appeared to be, in 1845 or 1847, among the papers of the executor of Joseph Dorland, the alleged grantee in the said alleged deed named, was sufficiently proved by its production without further evidence, although it did not appear in evidence that possession of the land therein mentioned was ever held under the said deed until subsequently to 1845, or that any possession was ever taken of the said land until 1842 or 1843, and although the learned judge was called upon by counsel for the plaintiff to leave it to the jury to say whether the fact of the said deed having remained until 1845, among the papers of the said Joseph Dorland, was not quite consistent with the evidence given on behalf of the plaintiff, that the said deed was fraudulent, and was never in fact executed by the said Rebecca Bowerman ; or why the said verdict should not be set aside and a new trial had between the parties upon the ground that the said verdict was rendered wholly against the law and evidence in the following, among other particulars, namely :

1. That although the said alleged deed, purporting to bear date the 1st day of June, 1813, was sufficiently impeached to remove the presumptive evidence of genuineness arising from

its antiquity, yet no evidence of the actual execution of the said deed, or of the acknowledgment thereof by Rebecca Bowerman, before a judge, as required by the law then in force in relation to the conveyance by married women of their estates, nor any evidence, other than such presumptive evidence arising from antiquity, was offered in support of the said deed.

2. That the only legal evidence which was given in relation to the said alleged deed was, that it never was executed or acknowledged by Rebecca Bowerman, the patentee of the said lands.

3. That the certificate of acknowledgment endorsed on the said deed, although subscribed by Chief Justice Scott, afforded no legal evidence of the acknowledgment by Rebecca Bowerman, the grantee of the Crown, or of the person making such acknowledgment being the said Rebecca Bowerman.

4. That upon the legal evidence which was given in relation to the said alleged deed, purporting to bear date the first day of June, 1813, and upon the evidence which was given of the acknowledgment under seal, executed by Isaac Playter, bearing date the 3rd day of August, 1847, the only verdict which should have been given, and could be sustained in law, was a verdict for the plaintiff.

In Hilary Term last *M. C. Cameron*, Q. C., shewed cause and cited, *Doe Spilsbury v. Burdett*, 4 A. & E. 1; *Doe Neale v. Samples*, 8 A. & E. 151; *Bishop of Meath v. Marquess of Winchester*, 3 Bing. N. C. 183, 10 Bly, 462; *McKenley v. Bowbeer*, 11 U. C. Q. B. 86; *Wynne v. Tyrwhitt*, 4 B. & Al. 376; *Prince v. McLean*, 17 U. C. Q. B. 463; *Roe Brune v. Rawling*, 7 East. 279; *Tiffany v. McCumber*, 13 U. C. Q. B. 159.

Gwynne, Q. C., supported the rule, and cited *Bac. Abr. Evid. F.* p. 304, 296, *Bul. N. P.* 255; *Gilbert on Evidence*, p. 83-90; *Starkie on Evidence*, 523, 1 *Shep. Touch.* 61, note *u*; *Forbes v. Wale*, 1 *Wm. Bl.* 531, and contended on the authority of the above cases, that regular proof of the execution of the deed should have been given, the presumption arising from its antiquity having been destroyed, and that the credit of the deed could only be restored by regular proof of

its execution, and that it was quite illogical to hold, as he submitted had been held by the learned judge at *nisi prius*, that although the presumption arising from antiquity had been removed by Mrs. Eckhart's evidence, still that the jury might have recourse to the *removed presumption* to uphold the deed. Secondly, that as no legal evidence in relation to the deed was given at all except the evidence of Mrs. Eckhart (Bowerman,) which was positive, distinct and unequivocal, that it was not executed or acknowledged by her, and there being no legal conflict of testimony on this point the judge should have so charged the jury. As to the way in which the deed should have been proved, he cited 1 Saund. Pl. & Ev. 937; 1 Sel. N. P. 564; Gilbert on Evidence, 89; Abbott v. Plumbe, 1 Douglas, 203; Cunliffe v. Sefton, 2 East. at p. 184. Subscribing witness, although blind, must be called—Crank v. Frith, 2 M. & Rob. 262, overruling 1 L. Raym, 734; Adam v. Kerr, 1 B. & P. 360; Wallis v. Delancey in note c. 7 T. R. 266; Rex v. Longnor, 1 Nev. & Man. 576; Whitlock v. Musgrove, 1 Cr. & M. 511; Jones v. Jones, 9 M. & W. 75; Greenshilds v. Crawford, 9 M. & W. 314. He further urged that proof of Chief Justice Scott's handwriting was no proof of the material points, viz: the identity of the person acknowledging the deed before him with Rebecca Bowerman, the grantee of the Crown; that the certificate was not in law any evidence of that fact, and there was no presumption as to it from the antiquity of the deed; that the law was the same as if the acknowledgment were recent and Chief Justice Scott were living, and that he (Chief Justice Scott) could not, if living, and the facts were recent, give any evidence on the trial except by his knowledge of the party or identifying her in court; that it was no answer to say that the objection, if good, would make a deed the older it is less capable of proof in the particular case. The answer to that being that the law *was* defective, and that this was the misfortune of the person claiming under the deed, and *e contra* it may with greater force be urged that if proof should not be required of an ancient deed when once discredited, it will be only necessary in forgery of a deed to take care that it be antedated thirty years, which will make it effectual in law.

Then this land having been the property of a married woman, the law provides that she could not convey unless in the precise manner *prescribed by law*, and that she did so must be strictly proved *without any presumptions*; that in this case it could not be said that no evidence could be procured, the woman herself being alive and having been called and having denied *in toto* the alleged execution and acknowledgment. He contended further that the difference in the nature and character of the evidence made the case of *Tiffany v. McCumber* no authority at all upon the points raised in this case, as to the sufficiency of the evidence offered in proof of the deed of 1813. A review of the statutes relating to married women conveying their estates will shew that it always was and still is essential that identity should be established between the party executing and the party acknowledging the deed, but the old statute provided no security that this identity should exist, nor any statutory evidence of its existence which the statute now in force does.

43 Geo. III., ch. 5, A.D. 1803; Revised Statutes Upper Canada, Public Acts, Vol. I. p. 101. That sec. 2, of this act, seemed to require that whenever a question of identity should arise evidence of identity should be produced, for by that section the deed was declared to be void, "*unless such married woman should appear, &c.*;" that sec. 3 provided that in case she did appear (which was a matter *dehors* the acknowledgment, and to be proved independently of the certificate,) then the certificate should operate upon her consent, leaving it still necessary to prove identity in order to enable the certificate of acknowledgment to operate; that the statute did not provide that the certificate should be even *primâ facie evidence of the matters certified*.

Secondly. By 59 Geo. III., ch. 3, A.D. 1819, p. 272, the time for taking acknowledgments was extended to twelve months.

Thirdly. By 2 Geo. IV., ch. 15, A.D. 1821, p. 319, a married woman might appear and acknowledge before the quarter sessions, neither of these acts made the certificate evidence of the matters certified.

Fourthly. By 1 Wm. IV., ch. 2, A.D. 1831, p. 527, new provision is made as to the certificate, and *as to the execution*

of the deed, but neither does this act make the certificate evidence of the matters certified (43 Geo. III. was by this act repealed, sec. 5,) *except as to conveyances executed under it.*

Fifthly. By 2 Vic., ch. 6, A.D. 1839, p. 938, new provision was made as to the execution and the form of certificates; certificates, *in accordance with the requirements of this act*, were now *for the first time* made *primâ facie* evidence (capable of being displaced by counter evidence) of the facts contained therein; but this certificate states, as a fact, that the deed *was executed* by the married woman in presence of the judge, and acknowledged by her, so that the execution and acknowledgment must, at all events, be by *the same person*. Identity therefore, must always now exist between the party *executing* and the party *acknowledging*, which 43 Geo. III. did not provide for.

He then referred to the English Fines and Recoveries' Abolition Act, 3 & 4 Wm. IV., ch. 74, A.D. 1834, 2 Chitty's Statutes, pp. 105, 106, and the form of affidavit in notes, p. 110, and ss. 85 to 88 inclusive of that act. This act shews that the Imperial Legislature thought it necessary to preserve evidence of identity, and having provided reasonable evidence for that purpose, makes an official copy of the certificate, not *primâ facie but complete evidence of the acknowledgment*. That the cases of certificates of settlement of paupers by parishes, when ancient, proving themselves, were no authority in this case, for they are certificates as to matters made by parties sought to be affected thereby. *Rex v. The Inhabitants of Netherthong*, 2 M. & S. 337; *Rex v. Whitchurch Inhabitants*, 7 B. & C. 573. So likewise in those cases, the justices signatures *allowing* the certificates, proving themselves, when ancient, do not affect this case, for there all that they profess to prove is the *act* of the parties, namely, the fact of allowance. *Rex v. The Inhabitants of Farringdon*, 2 T. R. 471. That Con. Stat. of Canada 22 Vic., ch. 80 (in *pari materiâ* with Imperial Statute 8 & 9 Vic., ch. 113, 1 Chitty's Statutes, p. 1118,) did not affect this certificate, as the certificate was not, he submitted, a judicial or official document within the meaning of 22 Vic., ch. 80, sec. 6, and if it were within that section then all that would be affected would be a dispensing

with the necessity of proving Chief Justice Scott's *handwriting*—the act gave *no effect to the document which, when proved, it would not have; it only dispensed with proof of handwriting.*

The maxim *omnia presumuntur rite et solemniter esse acta* only affords a presumption that the person acting did what the law requires of him; as in this case, that he examined the person who came before him, and that such person consented to bar her estate, but it affords no presumption as to the identity of such person—that she was the right person—for the law provided no means for the judge to ascertain *that fact*, and if it is presumed that he asked her was she the person, and that she replied that she was, that will not be sufficient. The law, 43 Geo. III., did not require the judge to demand any proof, nor did it prescribe any mode of proof of the material fact, namely, the identity of the person appearing before the judge with the person who, twelve months previously, may have signed the deed. As to the point of duress, and the document of the 3rd of August, 1847, under the seal of Isaac Playter, he contended, that this document was a complete bar to the defendant claiming through Playter, and that the whole charge of the judge on this point was a misdirection; that Lord Coke, in 2 Inst. 483, speaks of only four species of duress, viz: duress through fear of loss of life; duress through fear of loss of member; duress through fear of mayhem, and duress by imprisonment. As shewing what does not constitute duress he cited Bac. Abr. Duress, A., citing Lev. 69, where it is laid down; that where after judgment, the defendant having no good cause of action, caused the plaintiff to be arrested and detained in prison, threatening him that if he would not seal a release to him he should lie there and rot, and therefore he sealed one and was discharged, it was ruled by Bridgman, C. J., that the release could not be avoided by duress because he was in custody in the course of law by the King's writ, when he sealed the release, therefore the release was held good. That in 1 Shep. Touch. 62, it is said, "If one threaten one to take away my goods, burn or break my house, enter upon my land, kill or wound my father or mother, brother or sister, or friend, or do imprison any of them, and thereupon I seal a deed, this is good and shall bind

me, citing 2 Inst. 483. So if one distrain my beasts to compel me to seal a deed, and will not deliver them unless I do so, and threaten me that if I take the beasts again and not seal the deed he will kill me, and therefore I seal the deed, this is a good deed, and shall bind me. So if I be arrested upon good cause, and being in prison or under arrest I make an obligation, feoffment, or any other deed to him, at whose suit I am arrested, for my enlargement, and to make him satisfaction, this shall not be said to be by duress, but is good and shall bind me."

He then submitted that the execution of this deed shewed it to have been perfectly good, and that the fair presumption was that Playter executed it, having reason to believe that there was a known defect in the deed of 1813, and that the deed of 1843 to Orser was a good deed, and the only deed from the grantee of the Crown in existence; that up to the time, or a little before the time of the execution of the deed of 1843, the possession was the possession of Rebecca Bowerman, for the letters patent to her, entitling her to possession, made the possession hers until *proved to have passed out of her*, and no person having been in actual possession until 1842 or 1843, and the possession had then by Garrett Molloy not being at all shewn to be under the deed, and there being no presumption, as before contended, the possession was in fact and in law Mrs. Bowermans until Molloy entered in 1842 or 1843; that the treasurer's land tax books and the assessment rolls were the best evidence on this subject. Starkie p. 313, 4 edn., marginal title *Land tax books*, Doe v. Seaton, 2 A. & E. 171; Doe v. Cartwright, 1 C. & P. 218. That there was no possession had at all which could in any sense be said to be under the deed of 1813, until after the execution of the deed to Molloy in 1845; that the deed of 1813 was not, in fact, ever brought to light, as appeared from Dorland's evidence, until after the first action of ejectment was brought under the deed to Orser of 1843; that Playter might be presumed to have known or believed when he executed the deed of the 3rd of August, 1847, that there was a known defect in the deed of 1813.

In 1 Graham on New Trials, 272, it is laid down that it is erroneous in a judge to instruct a jury that they may indulge in a presumption not warranted by the evidence. A suggestion of fact, of which there is no proof, is misdirection, *Haine v. Davey*, 4 A. & E. 892. That the opinion of a judge as to whether a verdict is or is not against evidence, is only important where there is a conflict of testimony, and the opinion of the judge is as to the credibility of the witnesses; but where the question is what is the proper value of the evidence, in the absence of conflicting testimony, the opinion of the judge at the trial is not entitled to more weight than that of any other person. *Allaway v. Bennett*, 6 Jur. N. S. 347. And he submitted that the suggestions made by the learned judge who tried the case, in his charge to the jury, referred to in the 1st, 2nd, 3rd, 4th, 5th and 6th paragraphs of the rule *nisi*, were altogether unwarranted by the evidence and constituted misdirection.

JOHN WILSON, J.—The first and sixth grounds mentioned in the rule will be more conveniently considered together. In impeachment of this ancient deed it was contended, first, that it was not produced from proper custody in point of law. It was in fact produced by Willet C. Dorland, the son of the executor of Joseph Dorland, the grantee of the patentee, and he says, it was found among his father's papers. In the rude mode of conveyancing in common use in this province, until within the last fifteen or twenty years, it was the common practice for the owner of land to keep his patent or deeds and merely give a conveyance to the purchaser; but this deed and the patent were found among the papers of him who had been the grantee of the land. In *Doe Neal v. Samples*, 8 Ad. & E. 154, Patterson, J., says, "It is enough if the person be so connected with the deed, that he may reasonably be supposed to be in possession of it without fraud." And Coleridge, J., says, "It is sufficient that the custody be one which may be reasonably and naturally explained; though not strictly the proper custody in point of law." On the authority of this case and others, as well as on principle, we see no reason to impeach the deed on this ground.

It was secondly contended, that when the second deed was proved, it became then necessary to prove the ancient deed, by calling the witnesses if living, or proving their signature if dead, and this ought, it was said, more especially to have been done if the deed imported fraud ; as where a man conveys a reversion to one, and afterwards conveys it to another, and the second purchaser proves his title ; because in such case the presumption arising from the antiquity of the deed is destroyed by an opposite presumption, for no man shall be supposed guilty of so manifest a fraud. Buller N. P. 255. Bac. Abr. Ev. F. That case, however, differs from this. Here it was a conveyance of the whole estate in fee ; there, the reversion only, in which nothing is to be implied from the fact of possession, for neither of the grantees, in the case of a mere reversion, would necessarily have possession.

In the year 1843, when one Molloy, who claimed this land through this old deed, was in possession, the patentee, who had been a widow in the meantime and had married again, made a second deed, which was void under the statute of Henry the Eighth, because the grantor was out of possession and because the certificate was imperfect of its having been duly executed by the patentee herself. Under the circumstances there could have been no valid second deed made to impeach the first one till our Provincial Statute of 1849 authorized it. The second deed, rather than the first, we think, carried with it the imputation of fraud.

The third ground is that possession of the land did not accompany this ancient deed. It has just been stated how the actual possession stood so far. When this deed was sealed and delivered the Statute of Uses vested the possession in the grantee, which remained in him by operation of law, until some one else took possession.

Bowerman and his wife are said to have conveyed to Dorland on the 1st of June, 1813. Dorland conveyed to William Stapleton on the 7th of March, 1823. Stapleton conveyed to Trompou on the 20th of February, 1835. Trompou conveyed to Molloy on the 8th of May, 1845. Mrs. Bowerman says she knew Trompou, who told her thirty-six or thirty-seven years ago he had the land. About the year 1826 or

1827 one Harper took possession of the land and built a house on it, and at the time, or while he was in possession, he said, he held it under Trompou. Then Molloy went into possession in 1840, saying he had bought it, and from Trompou he got a conveyance in 1845. Between Harper and Molloy two men had been in possession, but under whom it does not appear. There is no evidence however, that their possession was adverse to Trompou, who then had the title. Those claiming through the same title yet remained in possession. This deed, coming from a custody not tainted with fraud, and possession having gone with it, we see no reason to impeach it on these grounds, and we think the learned judge was right in not leaving it to the jury to say whether the fact of the deed having remained until 1845 among the papers of Joseph Dorland, was not quite consistent with the evidence given on behalf of the plaintiff, that the deed was fraudulent and was never in fact executed by Rebecca Bowerman.

As regards the second ground, mentioned in the rule, the evidence of Rebecca Bowerman impeached the ancient deed, for she denied she ever executed it. It was fair subject of remark in respect of this, that from 1813 till 1843, she had done nothing about this land, she could not say that her coverture prevented it, for Bowerman had died, she had become a widow and had married Eckhart in the meantime. During all this time she had been in circumstances which must have made this land of importance to her, if she had not parted with it. That she had done nothing with the land while she was a widow, was, we think, evidence to go to the jury in support of the ancient deed. Bowerman died in 1823, she married again in 1831. Trompou asserted his claim in 1826 or 1827.

In regard to the third ground, we see nothing in the evidence to warrant the suggestion that some one must have personated Mrs. Bowerman, except the fact that in denying the deed, she denied the acknowledgment also. It was proper subject of remark for the judge, in referring to that suggestion, to allude to the smallness of the consideration, and to the small value of the land as negating the probability of getting some one to personify Mrs. Bowerman before Chief

Justice Scott in 1813. At this time land in Reach, and wild land over all the province, was of trifling value. In judging of probabilities as to the conduct of parties, it was right, we think, to refer to the circumstances of the times in which the transaction took place.

In regard to the fourth ground mentioned in the rule, it was argued that the learned judge had improperly admitted as evidence the exemplification of the judgment for the defendant in the action brought by Eckhart and his wife in the year 1847. That action was substantially between the same parties.

It has been held, that a recovery in ejectment between the same parties may be replied by way of estoppel to a plea of not possessed, and in an action for mesne profits. *Doe v. Wright*, 10 Ad. & E. 763; *Doe v. Huddart*, 2 C. M. & R. 316; *Matthew v. Osborne*, 13 C. B. 919; *Wilkinson v. Kerby*, 15 C. B. 430. But if the judgment in ejectment may be pleaded by way of estoppel as to the possession, a judgment for the defendant in the same kind of action is evidence, that at the time the action was brought the plaintiff had no right to the possession. In *Doe d. Strode v. Seaton*, 2 C. M. & R. 728, and S. C., Tyr. & G. 19, the defendants put in the judgment entered up by them in a previous ejectment, brought against them by the lessor of the plaintiff, together with the particulars of the demand in that action, both of which the learned Baron received in evidence. The jury having found for defendants. A new trial was moved for on two grounds, the last of which was, that the judgment recovered by the defendants in the former ejectment, should not have been admitted in evidence. Lord Abinger, C. B., said, "a judgment in an ejectment is not conclusive when given in evidence, as a party may be entitled to possession at one time but not at another, but it is clearly admissible." A man may have no other title than possession, and surely to shew a judgment each time another seeks to eject him, is giving proof of a title by possession. Parke, B., said, "a judgment is in no case conclusive unless pleaded by way of estoppel, but if it be between the same parties, it is evidence to go to the jury." Here the former judgment shews that on the day mentioned in the first demise the lessor of the plaintiff had no title to

demise the property in question. On the authority of these cases, we are of opinion the learned judge properly admitted the record in evidence, and that all that could be inferred against the plaintiff's right to recover at that time, and the defendants right to retain possession, were inferences proper to be drawn from the production of that record.

The fifth ground mentioned in the rule, as misdirection, will be more conveniently disposed of when we consider the same objection, as matter of law, in regard to the effect of what the plaintiff calls the acknowledgment of Isaac Playter, dated the 3rd day of August, 1847.

But the verdict is moved against as being contrary to law on four grounds. Those relating to the execution of the deed have been disposed of, the other grounds refer to the acknowledgment required by a married woman before a judge, the effect of the certificate which he is required to give, and the effect of the acknowledgment of Isaac Playter, under his hand and seal, dated the 3rd day of August, 1847. The objection to the certificate is, that no evidence was offered of the facts to which it certifies, other than the presumptive evidence arising from the antiquity of it, and that the certificate itself afforded no proof of the facts certified.

The signature of the Chief Justice was proved, unnecessarily we think. On the same principle that ancient deeds and writings are admitted as proving themselves, certificates of this kind prove themselves. From this certificate, it is to be presumed *primâ facie*, that every thing was done by the judge at the time, to justify him in certifying all that he professed to certify. In the case of *Tiffany v. McCumber*, 13 U. C. Q. B. 159, the jury were charged that, in the absence of the certificate, which was proved by a witness who could not speak of its date, they might properly presume, that it was given within six months from the time the deed was executed. Here the certificate is presumed, and we think every thing is to be presumed to give it effect.

Lastly, it is contended, that upon the evidence given of the acknowledgment under seal, executed by Isaac Playter, dated the 3rd of August, 1847, the only verdict sustainable was one for the plaintiff. The acknowledgment here referred to is in

these words : " This is to certify that we agree to give Gilbert Orser the sum of five shillings, cy., per month, for the use of the farm, being the south half of lot number thirteen, in the third concession of Reach, Home District, for so long a time as the said Gilbert Orser may let us have it, and moreover we fully bind ourselves to give up quiet and peaceable possession to the said Orser, of said farm, when he may require it, as witness our hands and seals this, the third day of August, in the year of our Lord eighteen hundred and forty seven." The plaintiff, in his notice, claims title by deed from James Eckhart and Rebecca his wife, who was Rebecca Bowerman, the patentee, and also by a deed of confirmation from her, and also by virtue of an acknowledgment of plaintiff's title by Isaac Playter, under whom Vernon claims.

The defendant appeared, and besides denying the plaintiff's title, set up title in himself and others, through whom he claimed by adverse possession, and also by deed to himself from Nathaniel Vernon, who claimed by deed from Isaac Playter and Sarah Playter.

At the trial the plaintiff relied on his claim of title from the grantee of the Crown, putting in an exemplification of the patent to Rebecca Bowerman, and proving his deeds so as to put the title in him.

The defendant, in answer, set up his paper title, producing the patent itself, which came from the same custody as the ancient deed, and proving his other deeds so as to shew the title in him.

The plaintiff, in reply, put in the " acknowledgment," as he called it, of the 3rd of August, and said, in fact, I have proved a title which you have displaced, but I estop you by this acknowledgment from Playter, through whom you claim, and on this I seek a verdict. Now we read this " acknowledgment " as creating a tenancy from month to month, determinable on proper notice. If the action had been brought on this alone, and the defendant had appeared, its mere production would not have enabled the plaintiff to recover without proof of the determination of the tenancy which had been created by it. We cannot see that it could have greater effect, when produced as it was, than if it had been produced

alone in the first instance. We think the judge ought, in strictness, to have prevented the plaintiff from setting up a case in reply, which he did not choose to set up at first as his case. The learned judge put it upon another footing, but it was one more favorable to the plaintiff.

On the whole we see no good reason for disturbing the verdict. We think substantial justice has been done. In *Petty v. Anderson*, 3 Bing. 170, it is laid down that when the judge sums up the whole evidence to the jury, it is not a ground for a new trial, where justice has been done by the verdict, that he expressed a strong opinion as to the facts.

Per cur.—Rule discharged.*

HEWARD ET AL. (APPELLANTS) V. LOGAN (RESPONDENT).

Canada Agency Association—Local director—Action against—Liability of.

L. arranged with the Canada Agency Association, an English company, investing money in Canada, and having defendant R. as their manager, and defendant H. as one of their local directors, for a loan of money. After paying off a prior mortgage on the lands of L., and the expenses, &c., the manager sent to his order a check for the balance of \$89.95, signed by R. and H., the defendants. L. having made a claim for a larger amount brought an action against R. and H. to recover the amount he claimed to be due him.

Held, that the defendants were not liable as they never received any money to the use of the plaintiff, having no control over the money except as manager and director of the Canada Agency Association, and were in no wise acting as individuals on their own behalf, but solely as officers of the company. That the evidence did not establish any privity between the plaintiff and the defendants in respect of the money claimed, and without such privity the action would not lie.

This was an appeal from the county court of the county of Wellington.

The declaration was on the money counts.

Pleas—never indebted, and payment into court of \$93.

At the trial in the court below

Richard Chipman, for the plaintiff, said, I am accountant for the Canada Agency Association at Toronto; defendant Roche is manager; defendant Heward and Mr. Cayley are

* Leave to appeal was moved and granted, but the plaintiff, solely by reason of poverty, was unable to, and did not prosecute the appeal.

directors. All act in attendance at board meetings. Plaintiff had a loan granted to him of \$800: we paid over the \$800: we paid \$612 to the solicitors to remove an incumbrance on the property, that is McCrae's mortgage. The difference, deducting charges, was paid over to the plaintiff. The balance paid over was \$89.95. The check for that amount to plaintiff was received back. We paid over the \$20 deposit.

The loan was	\$800	We paid McCrae's	
Deposit by plaintiff.....	20	mortgage	\$612 75
		Paid into court.....	93 00
	<hr/>		<hr/>
	\$820		\$705 75

The balance of \$114 25 was applied to pay expenses. The money is sent from England to defendant Roche, and is subject to the charge of two directors, or the manager and one director. The manager said the \$89.95 was the correct amount.

On cross examination he said, the bank account is kept in the name of the Canada Agency Association. The cheque bears the stamp of that association. Defendant Heward is not a co-manager with Mr. Roche. Mr. Buchan is a trustee with Mr. Heward. Mr. Heward has nothing more to do with the matter than Mr. Cayley. Defendants did nothing in connection with the loan except as manager and director of the association. The board passed the loan, *the property to be insured for one year* beyond the time of the loan: this is endorsed on the back of the application. A copy of the account sent with check produced. The items deducted from the \$820 appear by that account to be as follows:—

Valuation fee to Mr. Webster.....	\$8 80
Solicitor's fee	20 00
Do. do. extra.....	16 00
Insurance for 6 years, charged at 5 years, 1	
year's discount by "Royal"	45 60
Interest from 26th August to 1st October.....	6 30
Commission for Agency, 2½	20 00
Postage	60

\$117 30

This being deducted from the loan of \$800 and \$20 deposit,
 leaves \$702 70
 Of this there was paid to McCrae 612 75

Leaving a balance of \$89 95

For this amount the cheque was sent. The defendants had no control of the money as individuals. The defendants opened the bank account in the name of the Canada Agency Association. We draw for money upon the directors of the association in London. We are authorized to draw by letters of credit. We must have an application from them. The money is placed to the credit of the account in the name of the association opened by the defendants. I am not aware that the directors in England could draw the money from the bank in Toronto. The defendants make that arrangement as manager and director. The policy taken out by the defendant is in the name of the Canada Agency Association. The insurance was effected in the usual way with the company. We had money on hand at the time. This particular money was not drawn for. The amounts paid were paid by the Canada Agency Association. There was an appropriation on the other side of the water for the loan, and having funds on hand we paid the money over. We perhaps don't draw for months. A letter put in dated 2nd July looks like Mr. Webster's. The facts stated in that letter are correct. We received a letter of credit for that particular purpose; that is, we were authorized to give the \$800 to the plaintiff. The association had a capital, and the money loaned in this particular instance was from their own funds, not the funds of any particular lender. The cheque for the insurance money was signed by Roche, Heward or Mr. Cayley, certainly by one of the two. Mr. Heward is agent of the Royal.

A verdict was rendered for the plaintiff for \$63.20.

In January term, 1863, a rule was taken out calling on the plaintiff to shew cause why the verdict should not be set aside and a non-suit entered on the following grounds pursuant to leave reserved:—

First, that the moneys, portions of which are sued for in this action, were not under the control of the defendants as

individuals, but as officers of the Canada Agency Association. Second, the said association ought to have been sued and not the defendants, the defendants being merely officials thereof. Third, that the defendants are liable only for \$89.95 (paid into court), the amounts they received after paying the demands upon the amounts advanced by the association on the mortgage. Fourth, that if the defendants were agents for the Canada Agency Association they are not liable to the plaintiff unless there was a binding engagement between them and the plaintiff. Fifth, that it was not shewn that the defendant Heward was acting conjointly with the defendant Roche in retaining the amount now claimed by the plaintiff, or that he acted otherwise than as a director of the association, or why the verdict obtained in this cause should not be set aside and a new trial had between the parties upon the ground of misdirection by the learned Judge before whom the case was tried,—First, in not telling the jury that upon the evidence adduced, and particularly with reference to the charges against the plaintiff by James Webster that they should find that James Webster was the agent for the plaintiff, and that the plaintiff was bound by letters and communications made to him with reference to the insurance required by the association. Second, in refusing to tell the jury that if the defendant in good faith paid over the amount charged for insuring the premises to the insurance company, there being no evidence that the plaintiff had effected an insurance in accordance with his application, which was a condition precedent to his getting the money the defendants were not chargeable with it. Third, in charging the jury that the covenant for insurance in the mortgage was evidence against the defendants, instead of directing them that (if at all) it was only evidence against the association. Fourth, in refusing to tell the jury that the cheque having been signed by the defendant, Heward was not evidence of the fact of his acting in any other capacity than as a director of the association. Fifth, in leaving the fact of the payment of the McCrea mortgage to the jury as evidence against the defendants instead of charging them that such payment of the McCrea mortgage was not evidence of the liability of the defendants or either of them.

To this rule the plaintiff shewed cause.

The judgment of the court below was that the verdict for the plaintiff should be set aside and a new trial had between the parties, unless the plaintiff consented to the verdict in his favour being reduced from \$63.20 to \$47.20. From this judgment the defendant has appealed.

In Easter Term, 26 Vic., *Adam Crooks* for appellant cited *Coles v. Wright*, 4 Taunt. 198; *Barron v. Husband*, 4 B. & A. 612; *Williams v. Everett*, 14 East, 582; *Moore v. Bushell*, 27 L. J. Ex. 3; *Stephens v. Badcock*, 3 B. & Ad. 354.

McMichael for respondent.

RICHARDS, C. J.*—In my opinion these defendants are not liable. The plaintiff negotiated with the Canada Agency Association for a loan of \$800, to be secured on real estate in Upper Canada. The Canada Agency Association are a company incorporated under an Imperial statute. Their principal seat of business is in England, but they have a manager and two directors here to transact a certain part of their business, to receive and decide upon applications for loans on real estate, the title being approved by the company's solicitors here, and the loan being agreed to, and the funds supplied from England, to accept the securities and to pay the money, less the proper charges and expences to the borrower. In the present case the plaintiff's application for a loan was approved here and accepted in England in the usual way of business. The corporation kept an account with a bank here; and the funds at the credit of that account could only be drawn out by cheque signed by the manager and one of the directors or by the two directors without the manager, or I presume by all three. The plaintiff's land was subject to a previous mortgage, which was to be satisfied out of the loan, and \$612.75 of the company's funds was paid for this purpose. Various items of charge were made for investigation of title, &c., &c., and for insuring plaintiff's premises for *six* years against loss by fire though the loan was only for *five* years. For the difference

* This judgment was prepared by Draper, C. J., before leaving this court, and was adopted as the judgment of the court.

between the amount of these charges, with the sum of \$612.75, and the amount of the loan \$800, a cheque was drawn as follows:

“No. 1168. Toronto, September 11, 1862. Commercial Bank of Canada: Pay to Mr. William Logan, of Salem village, or order, for proceeds of loan, per account, \$89.95. (Signed) F. H. HEWARD, Director; *per pro*, A. R. ROCHE, Manager; R. M. CHIPMAN.”

The plaintiff returned this cheque in a letter dated 16th September, 1862, written by his solicitors and addressed to Mr. Roche as manager of the Canada Agency Association claiming instead of \$89.95 “at least \$175.” And as Mr. Roche would not yield to this claim, this action was brought against the two defendants for money had and received to the plaintiff’s use. Except the signing his name to the cheque the evidence does not shew anything done by Mr. Heward in the matter: Mr. Roche as manager conducted the correspondence; all the letters from the plaintiff or his solicitors were addressed to Mr. Roche as such manager, and the defendant Heward’s name does not appear in this correspondence on either side.

With sincere respect for the ability and painstaking of the learned judge of the court below, I am compelled to dissent from his conclusion. I do not see that any money was received by these defendants for the plaintiff’s use. The money for the loan never was for an instant in either of the defendant’s hands: all they had was authority as manager and director of the Canada Agency Association to draw in favour of parties entitled to receive it, upon the funds of that corporation lodged in the bank, in this instance, for \$800 in the whole. In so drawing to satisfy the mortgagee, who was to be paid off, the parties entitled to claim for charges and expenses, the insurance premium and the plaintiff, they were in no wise acting as individuals on their own behalf, but solely as officers of the company. Before they drew cheques the money was at the credit of the corporation, and after they drew them the money did not come into the defendant’s hands, and certainly not into the defendant Heward’s. The evidence as it seems to me established no privity between the plaintiff

and the defendants in respect to the money claimed, and without such privity this action will not lie.

We are not called upon to express any opinion as to the charges deducted from the loan to the plaintiff—assuming that he rightly contests them or any part of them—that gives him no right of action against the defendants. It is the company who wrongfully detains his money, if it be wrongfully detained.

I think therefore the appeal must be allowed and judgment of nonsuit be given in the court below.

Per cur.—Appeal allowed.

BOULTON V. McNABB.

Promissory Note—Collateral to mortgage—Merger of in new mortgage—Evidence New Trial.

An action on a pro note for \$350. Pleas, that the note had been taken as collateral to a mortgage, in satisfaction of which the defendant and plaintiff had come to a settlement, and the defendant had given a new mortgage for what he owed the plaintiff, and the note had thus become merged in the new mortgage. The plea having been upheld by the jury, on motion by plaintiff for new trial, on the ground of the verdict being contrary to evidence and the judge's charge.

Held, That the note having been taken by the plaintiff as payment of part of the mortgage, and thus separated from the mortgage debt, the plaintiff was entitled to recover. That from the evidence it appeared that the note was given for a sum quite distinct from the mortgage debt.

Seemle, That the defendant's remedy (if any) should be either to have the settlement re-opened on the ground of mistake or fraud, and get the amount of the note added to the mortgage debt and extended for ten years, or to treat the settlement as evidence of everything having been paid, which latter defence would be covered by a plea of payment.

The declaration was on a promissory note, dated the 2nd of March, 1861, made by the defendant, payable three months after date to the plaintiff or order at the Bank of Toronto, in the sum of \$350. The plea stated that the defendant had purchased two parcels of land from the plaintiff, and had given him a mortgage on each parcel for the purchase money, one of which mortgages was to secure the sum of £550, and the other the sum of £400, with interest on each of the sums. That the defendant paid the plaintiff before the 5th of December, 1861, £150 on the first mortgage, and also all the interest on both the mortgages, except £42 12s. 2d., and on the said day there remained due for principal and interest on

both the mortgages the sum of £842 12s. 2d. only. That the promissory note in the declaration mentioned had theretofore been given, and was then held by the plaintiff on account of and as collateral security for \$350 of the last mentioned sum, and not on any other account or for any other consideration. That on the said 5th of December, it was agreed between the plaintiff and the defendant by deed that the defendant should sell to the plaintiff, and that the plaintiff should accept a certain other parcel of land, called the Kippel land, in satisfaction of £400 of the said £842 12s. 2d., and that the plaintiff should extend the time to the defendant for payment of £442 12s. 2d., the residue thereof for ten years, with interest half-yearly. That the defendant covenanted to pay to the plaintiff the sum of £442 12s. 2d., with interest as aforesaid. That the defendant conveyed to the plaintiff the Kippel land, and the plaintiff accepted and received the same in satisfaction of the sum of £400 as aforesaid. That the promissory note and the moneys thereby secured, and in the declaration mentioned, were merged in the sum of £842 12s. 2d., so satisfied and covenanted to be paid as aforesaid; and that the plaintiff did agree to accept and did accept the said conveyance and covenant of the defendant in full satisfaction and discharge of the promissory note and of the causes of action in the declaration mentioned, upon which plea the plaintiff joined issue.

The cause was tried at the spring assizes of 1864 for the United Counties of York and Peel, before the Chief Justice of Upper Canada, when a verdict was rendered for the defendant.

During last term the plaintiff obtained a rule on the defendant to shew cause why a new trial should not be had on the ground that the verdict was contrary to evidence and the judge's charge, and that there was no evidence to support the defendant's plea.

M. C. Cameron, Q. C., and *C. S. Patterson* shewed cause, and contended that even if the note were not included in the settlement between the parties, still the moneys contained in it did in fact form part of the original mortgage money, all of

which has been acknowledged to have been paid but the sum of £442 12s. 2d.; that therefore the plea has been proved, and the issue joined upon it has been rightly found for the defendant.

G. D. Boulton supported the rule, and contended that the evidence shewed that the note had not in fact been included in the settlement, and did not sustain the plea, and that a new trial should be granted, for the verdict was both against the evidence and the judge's charge.

ADAM WILSON, J.—The defendant, who was called by the plaintiff, stated that he thought the whole of the mortgage money was included in the settlement between himself and the plaintiff in December, 1861, and he afterwards said “my belief is that the plaintiff intentionally excluded the amount of this note from his calculations, and that the present note is a renewal of a former note given by me on account of mortgage moneys before the settlement.” This note having been taken by the plaintiff as a payment of a part of the mortgage debt, and so in this way separated from the claim on the mortgages, and not having as it appears been brought into the settlement in fact in December, 1861, it may be and no doubt is true that only £842 12s. 2d. was due on the mortgage at that time.

But this fact does not alone prevent the plaintiff from recovering upon the note so given, otherwise the fact of taking a note for arrears of mortgage money, would when a receipt was given for the mortgage debt (so satisfied by this note) be conclusive evidence of the payment of the note itself, merely because it consisted of a portion of the mortgage debt which had been acquitted.

That the plea after alleging that the sum of £842 12s. 2d. only remained due upon the two mortgages, proceeds, “and the promissory note in the declaration mentioned had theretofore been given and was then held by the plaintiff on account of and as collateral security for \$350 of the last mentioned sum and not on any other account or for any other consideration.”

Now this is a matter of fact and is not sustained at all by the defendant's evidence, which speaks of this note having been in effect given for a sum quite distinct from the £842 12s. 2d.

Then treating the amount of the note as constituting a part of the latter sum the defendant alleges it became merged in the new security that was given for £442 12s. 2d., part of the above sum after the satisfaction of the other £400 of it by the land which was taken; but this is all dependent upon the precedent fact whether this promissory note did or did not constitute a part of the sum of £842 12s. 2d. If it did the plea is true; if it did not the plea is false.

The real complaint of the defendant we understand to be, that he now thinks the amount of the note was purposely excluded from the settlement by the plaintiff, by which he is now called upon to pay instant the amount of it, instead of having ten years to pay it, as he would have had if it had been brought into settlement. And that when the settlement was made he believed the note had been brought into account by the plaintiffs, and that the sum of £842 12s. 2d. was all that he really owed upon or in respect of the mortgage transactions in any way whatever.

From these facts if the defendant has any remedy whatever it must be by re-opening the settlement on the ground of mistake or fraud, and by getting the amount of this note added to the £442 12s. 2d., and the time extended for its payment to the ten years, or else by treating the settlement as sufficient evidence of every thing else having been paid which was not then reckoned as unpaid, and leaving to the jury the plaintiff's conduct as the defendant represents it upon that accounting as some evidence of the fact.

The former defence would not arise in this court; the latter would be covered by a plea of payment; but such a plea is not pleaded. But in either view of the case there can be no reason why a plea not true in fact should be allowed as a defence to a state of facts not only beyond, but utterly at variance with its terms.

There must therefore be a new trial without costs.

Per cur.—Rule absolute for new trial.

During this term the following gentlemen were called to the bar:—THE HONORABLE MICHAEL HAMILTON FOLEY, EDWARD JAMES DENROCHE, THOMAS FERRIS NELLIS, GEORGE BOYS NICOL, WM. LAIDLAW, JAMES FREDERICK DENNISTOUN, JOHN COYNE, JOHN IDINGTON, LYMAN ENGLISH, JOHN EDWIN FAREWELL, BEVERLY JONES, GEORGE MOUNTAIN EVANS, HENRY HAMILTON LOUCKS, WALTER JOHN HAYWARD, WM. WILBERFORCE HAMILTON.

DIGEST

OF

CASES REPORTED IN VOL. XIV., BEGINNING MICHAELMAS
TERM, 27 VIC., ENDING TRINITY TERM, 28 VIC.

ABSCONDING DEBTOR.

1. *Absconding debtor—Judgment against — Collusion — Attaching creditor.*—On an application of one of the creditors of defendant, an absconding debtor, to set aside the judgment and subsequent proceedings in this cause, on the grounds that the same was obtained by collusion, &c. It appeared by the affidavits filed, that one of the notes on which the action was brought was dated the same day the writ was issued, 23rd September, 1863. Three days after the defendant absconded. The relations between the defendant and the plaintiff were proved to have been intimate. A lawyer had been consulted a week previously to the commencement of the action, in relation thereto, and no defence having been made to the action, *Held*, that these were facts from which it could reasonably be inferred there was collusion between the parties such as the statute was intended to prevent. *Bevan v. Wheat*, 51.

2. *Absconding debtor—Sheriff—Action brought to recover rent by under the statute—Evidence—New trial.*—In an action brought by a sheriff, under the Absconding Debtors' Act, to recover rent due by virtue of a lease to the absconding debtor, the evidence given on the

trial shewed an assignment of the reversion by the absconding debtor, and receipt of all, and half a year's more rent than was due thereon. The *bonâ fides* of the transaction between the absconding debtor and his assignee having been submitted to the jury, they found for the defendant in this suit. Upon motion for a new trial, *Held*, that although as between parties themselves, litigating their own disputes, the court would require a stronger case to disturb the verdict than was made out in this instance; yet here, the plaintiff being a public officer, suing in the right of his office, and knowing nothing of the transactions between the defendant and absconding debtor, and the circumstances of the case appearing somewhat suspicious, a new trial was ordered on payment of costs. *Reynolds (Sheriff) v. Pearce*, 369.

3. *Judgment against absconding debtor—Bonâ fides of application to set aside.*—This was an application by the Bank of Montreal to set aside the judgment obtained in this cause on the ground of fraud and collusion with the absconding debtor. The defendant, being largely indebted to the bank, absconded on the 24th of May, 1864; previously, on the 7th of May, having assigned part of his property to the beneficial

plaintiff herein. The judgment recovered was on a note for \$1,000, dated 1st October, 1863. The summons was issued on the 27th April, 1864, judgment signed 17th May, and execution issued on the 25th of same month. The *fi. fa.* was endorsed for \$1,037.83 debt, and \$17.39 costs. After an application had been made in chambers to set aside the writ, the beneficial plaintiff admitted that he had only advanced £100 on the note sued on. *Held*, that the beneficial plaintiff not denying or explaining the circumstances mentioned in the affidavits filed, or why he allowed judgment to be entered and the *fi. fa.* endorsed for \$1,000 instead of \$400 (the amount actually due him) until the judgment was attacked, and his explanations not being satisfactory as to the *bona fides* of the transaction, the judgment was fraudulent and should be set aside. That the practice of an attorney, using the name of his clerk as nominal plaintiff instead of the name of his client, was a reprehensible practice, and should be discontinued. *Dickson v. McMahon*, 521.

ACCEPTANCE.

Of work done.]—See AGREEMENT.

ACCIDENT.

To passengers by negligence.]—See STEAMBOAT.

ACCOUNT STATED.

1. *Account stated—Evidence of.*]—In support of an account stated as set out in the declaration, the following memorandum was put in as evidence: “\$300—Good to T. T. to the amount of \$300, to be paid to him or his order, at E. C.’s mill, in the township of Elma, in the county of Perth, in lumber, at cash price. (Signed,) J. C., sen.; J. C.” *Held*, a sufficient acknowledgment of debt or liability and a promise to pay, and that it imported a sufficient consideration to sustain the account stated in the declaration. *Tyke v. Cosford*, ‘64.

2. *Account stated—Promissory note—Evidence—Exchange on New York.*]—In an action on an account stated to recover the sum of \$1,040 23, with the current rate of exchange thereon on New York, the plaintiff offered as evidence of the debt an instrument in the following form: “New York, January 28th, 1861.—\$1,040 23—Thirty-two months after date I promise to pay to the order of myself ten hundred and forty-two dollars and twenty-three cents, at the Bank of Upper Canada, Toronto, C. W., with the current rate of Exchange on New York. Value received.” This was signed and endorsed by the defendant. *Held*, that the production of the instrument was *prima facie* evidence of an account stated between the parties, and the instrument being a promise to pay the amount claimed, with the current rate of exchange on New York, in Toronto, at its maturity, the amount thereof was payable in Canada money. *Wood et al. v. Young*, 250.

ACTION.

Against sheriff for rent.]—See ABSCONDING DEBTOR, 2.

By whom maintainable.]—See BAILIFF.

Against local directors of Canada Agency Association.]—See CANADA AGENCY ASSOCIATION.

Against mortgagee for dower.]—See DOWER.

Against executors on judgment.]—See EXECUTORS, 3.

On policy.]—See INSURANCE, 2.

Notice of.]—See MAGISTRATE.

Cause of, set up as defence in previous action.]—See PLEADING.

Against sheriff and sureties.]—See SHERIFF, 2.

AFFIDAVIT.

Verifying the proper taking of evidence under a commission.]—See EVIDENCE.

AGENT.

Insurance agent liable for misfeasance.]—See INSURANCE, 4.

AGREEMENT.

Agreement—Substantial performance—Acceptance and acquiescence—Work and labour, &c.]—A. having signed a writing, not under seal, in the following words: "To William Baker, Christopher Vanluven, John Ansley, Zadoc Wright, and John Hughes, gentlemen,—We, the undersigned, understanding that you have resolved to build a church 30 × 40 feet, at a cost of \$1000, in the village of B., do hereby covenant and promise to pay you the several sums opposite our respective names, to assist you in the erection of the said church, and we bind ourselves to pay a fourth of said subscription every three months, and that the whole be paid on or before the 1st of October, 1860,"—and the parties having built a church at the place named, thirty-six feet wide by forty-eight feet long, and of the value of \$1200, with which A. found no fault, but had a pew therein cushioned for his own use, which he had always occupied. *Held*, that the church built was a substantial performance of the agreement, and *held* also, that by the acquiescence and acceptance of the work by A. a new contract might be inferred in which A. would be liable for work and labour and materials provided. *Baker et al v. Vanluven*, 214.

ALDERMAN.

Property qualification of.]—See QUO WARRANTO, 2.

AMENDMENT.

Of pleadings.]—See NOTICE OF TRIAL.

APPEAL.

Appeal—Bond—Judgment.]—*Held*, that the right to appeal from a decision of a judge of the County

Court must be exercised before the entry of judgment in the cause. A bond having been allowed, and the appeal books set down for argument, after judgment entered, the case was struck out upon motion to that effect. *Duffil v. Dickenson*, 142.

ASSESSMENT.

Assessment—Sale of lands for arrears of taxes.]—The north and the south half of a lot of land having been assessed separately, and different amounts charged against each half lot, which amounts were afterwards added together and charged against the whole lot, and a portion of the whole lot having been sold for the combined amounts, being the respective arrearages of taxes due upon each half lot. *Held*, that such sale was illegal. *Laughtenborough v. McLean*, 175.

ASSIGN.

A good operative word in deed.]—See EJECTMENT, 1.

ATTACHING CREDITOR.

See ABSCONDING DEBTOR, 1.

Payment of costs of new trial by.]—See NEW TRIAL.

ATTACHMENT.

Lands sold under Division Court.]—See EJECTMENT.

ATTORNEY.

1. *Attorney—Roll of Court—Striking off of.*]—A certificate of the clerk of the court in which an attorney has been struck off the rolls, and on which an application under the rule of court is made to another court, to have the attorney struck off the rolls of that court, should shew the grounds on which he was struck off the rolls of the court from which the certificate was granted. The application should also be for a rule to shew cause and should not be moved for on the last day of term. —*In re. Tremayne, an Attorney*, 257.

2. *Attorney—Costs—Misconduct.*]

—An attorney having been retained to prosecute an action (the plaintiff being unable to pay the witness fees), requested the plaintiff's brother to do so; stating that he would see him paid when the money was recovered from the defendant. The suit was afterwards settled between the parties, and an order for taxation of the attorney's bill was taken out by the plaintiff. In the bill, as claimed by the attorney, he included the amount £12 7s. 9d. supposed to have been paid the witnesses; and on the taxation, made an affidavit in which he swore that £12 7s. 9d. was procured by him for the payment of the witnesses in the cause, and that the said amount was not, nor was any portion thereof, furnished by the plaintiff, or at any time refunded or paid by him; and that the said plaintiff knew that he was providing the means of paying the disbursements in the said cause, including the said witness fees. It subsequently appeared, but the attorney was not aware of it at the time, that only one small sum of the witness fees had been paid; and he, considering himself bound to repay the amount to the plaintiff's brother, included the total amount of the fees as disbursed in his bill of costs. Upon a motion calling upon him to answer the affidavits filed as to the above facts, *Held*—That inasmuch as it did not clearly appear that the attorney had no reason to suppose the money for which he was considered responsible to plaintiff's brother, had not been advanced, and as it would not be presumed he was about to act dishonourably with the money, if obtained from the plaintiff—the rule was discharged, the attorney being ordered to pay the plaintiff's costs of the application. *In re S——, an Attorney, in the suit of McLean v. Campbell*, 323.

AWARD.

Indebtedness under.—See PROMIS-
SORY NOTE, 2.

BAILIFF.

Bailiff—Case—By whom maintainable.—The defendant, who was the attorney for an execution creditor, and who indemnified the bailiff who executed the *fi. fa.*, is not responsible over to an assistant whom the bailiff employed, for damages recovered against such assistant by a person who claimed the goods seized as his property. As to references in one count to another. *Eadus v. Dougall*, 352.

BOND.

Appeal bond.—See APPEAL.

Replevin bond.—See REPLEVIN.

To convey land.—See COVENANT, 2

Action on.—See REPLEVIN.

BOOKS.

Wrongful conversion of.—See TROVER, 2.

BREACH.

Of covenant.—See COVENANT, 1.

BYE-LAW.

Against sale of liquor.—See MUNICIPAL INSTITUTIONS, 2.

By-law—Opening of road—Encroachments thereby—Quashing of by-law—Laches in application—Con. Stat. U. C. ch. 54, secs. 319-323.—The Municipality of the Township of York passed a by-law, causing a road to be surveyed and laid out, on the petition of the owners of the land in the neighborhood, which passed through the plaintiff's land; and this motion is made to quash the by-law, on the ground that the road, as laid out, encroaches upon plaintiff's garden and out-house, and also covers the ground upon which his toll-house stands. The plaintiff was heard in person by the municipal council as against the passing of the by-law authorizing the opening of this road as laid out; and although he then objected to the opening of the road generally, he did not do so upon the ground that it en-

encroached on his buildings or garden. By the affidavits, it appeared that this road had been opened a number of years before, by the plaintiff's father, and had been travelled as a public highway; it was of advantage to plaintiff, and that he had charged toll for travelling over it. It also appeared that the only building the road encroached upon was a small hen-house, of but little value, being about forty years old; it also passed over the ground occupied by the frame of a proposed toll-house. The old road, as travelled, varied in width from twenty-nine to sixty-five feet, and in defining the width of the road so to be opened, it encroached slightly on plaintiff's property.

Held, that, under the circumstances of the case, as set out above, and doubting as to the *bonâ fides* of the plaintiff's opposition to the road, on the grounds taken on this application, and deeming that the public will be benefited by opening said road, and as the plaintiff will have his remedy for compensation for any injury sustained, the rule should be discharged without costs.

Semble.—Action for redress should be prompt, in respect of matters especially not apparent in the by-law; and should a plaintiff have allowed two terms to pass without any application, any redress might well be refused him on account of laches. *Scarlett v. Corporation of York*, 161.

CANADA AGENCY ASSOCIATION.

Canada Agency Association—Local directors—Action against.—L. arranged with the Canada Agency Association, an English company investing money in Canada, and having defendant R. as their manager and defendant H. as one of their local directors, for a loan of money. After paying off a prior mortgage on the lands of L. and the expenses, &c., the manager sent to his order a check for the balance of \$89 95, signed by R. and H., the defendants. L. having made a claim for a larger amount, brought an action against

R. and H. to recover the amount he claimed to be due to him. *Held*, that the defendants were not liable, as they never received any money to the use of the plaintiff, having no control over the money except as manager and director of the Canada Agency Association, and were in no wise acting as individuals on their own behalf, but solely as officers of the company. That the evidence did not establish any privity between the plaintiff and the defendants in respect of the money claimed, and without such privity the action would not lie. *Heward et al. (Appellants) v. Logan (Respondent)*, 592.

CANADA COMPANY.

Canada Company—Powers of attorney—Execution of deed under—Imp. Stat. 6 Geo. IV. c. 75.—*Held*, 1st. That the recitals in the Imperial statute 6 Geo. IV. c. 75 are sufficient proof of the charter of the Canada Company. Secondly, that it is not necessary that deeds from the company should be executed under the company's seal, kept in England, but that the company had power to appoint a special seal for the execution of deeds by their commissioners in this country; and proof of the delivery of a special seal for that purpose to a commissioner then in England, who proved the execution of a deed in this country, in an action of ejectment, *held*, sufficient. 3rdly. That the seal of a corporation having been proved by satisfactory legal evidence, the production of a document within the scope of the powers of the corporation, with such seal attached, is sufficient *primâ facie* evidence of the proper execution of the document. *Woodhill v. Sullivan et al*, 265.

CASUS OMISSUS.

Where city and county separated for registration purposes.—*See* REGISTRY.

CAUSE OF ACTION.

Where same arose.—*See* DIVISION COURT.

CERTIORARI.

Writ of certiorari—Practice after removal by—Change of venue.—*Held*, that a judge, having all the material facts before him, had a right to grant a writ of *certiorari* and impose such terms as he should think fit, but had not the power to deprive the plaintiff of his legal rights in regard to the position of the cause. That when a defendant removes a cause by writ of *certiorari* the plaintiff has the option to proceed or not, but if the pleadings be removed and stands as pleadings in the Superior Court, the defendant will be in a position to compel the plaintiff to proceed. The plaintiff must declare *de novo*. That a judge has no power to change the venue by the order granting the writ of *certiorari*, as the application for changing venue should be a substantive motion, when the plaintiff has shewn where he will lay his venue after the cause has been removed. *Per J. Wilson, J.*—(dissenting from the judgment of the court)—That when a cause is removed by *certiorari* from a county court, the proceedings in the court below should stand and be the proceedings in the court to which the cause is removed. *Patterson v. Smith*, 525.

CHATTEL MORTGAGE.

Purchase under power of sale in.—*See* INTERPLEADER, 2.

Chattel mortgage—Description in—Delivery.—*C. and J.*, by chattel mortgage, dated 6th February, 1863, conveyed certain goods mentioned and described in schedules attached thereto to the plaintiff. Some of the goods mentioned therein were at the time in possession of the manufacturer, one Reid; other portions were in certain rooms in the American and Burlington Hotels. The description given merely designated a portion of the property by locality, giving no particular description, and was as follows:—"All and singular the goods and chattels, furniture, household stuff, and articles particularly mentioned and express-

ed in the schedule hereunto annexed, and which are now in the warehouse of James Reid, in the city of Hamilton, and are about to be placed in the building known as the Burlington Hotel." (The schedule begins)—"Schedule mentioned and referred to in the annexed indenture: one set parlour furniture, &c. (describing some articles), in parlour H; one walnut bedstead, &c. (describing several articles), in parlour C." The writ under which the seizure by the sheriff took place, was received by him on the 27th May, 1863, at the suit of the defendant against C. & J. *Held*, 1st, That all the goods in the schedule, which were described as having been in certain rooms in either of the hotels, did, upon the authority of *Frazer v. The Bank of Toronto*, 19 U. C. Q. B. 381, and *Powell v. The Bank of Upper Canada*, 11 U. C. C. P. 303, pass by the mortgage; 2nd, that all the goods described as being in certain rooms, and which were not in those rooms at the time, did not pass; 3rd, that goods described specifically (as one omnibus, &c.), without any local description, passed (under the authority of the cases above referred to) also, because the description would be sufficient in an action of detinue; 4th, that all the goods which were the property of the mortgagors in Reid's warehouse (being made at the time of executing the mortgage) passed under the mortgage as a distinct grant from those in the schedules. Some goods, not mentioned in the schedules, were delivered by one of the mortgagors to the plaintiff's agent, on the 4th May, 1863; the sheriff received the writ of execution on the 27th of the same month: *Held*, that such delivery before the writ came to the sheriff's hands was good against the sheriff. *Mills v. King*, 223.

CHOSE IN ACTION.

How far coupon not assignable.—*See* COUPON.

COLLUSION.

See ABSCONDING DEBTOR, 1.

COMMON COUNTS.

Special plea to.]—See CONTRACT.

COMMISSION.

To take evidence and proceedings under.]—See EVIDENCE.

CONCESSION LINE.

See SURVEY.

CONDITION.

In mortgage.]—See EJECTMENT, 9.

CONSIDERATION.

What a sufficient statement of to satisfy the Statute of Frauds.]—See GUARANTEE.

CONTRACT.

Made in United States.]—See FOREIGN CONTRACT.

Executory contract with a corporation.]—See TRADING CORPORATION.

Contract—Special plea—Common counts.]—The plaintiffs sued on the common counts for \$2,062 02, an amount of money in the hands of defendants, advanced by plaintiffs to them on account of oil furnished by the defendants to the plaintiffs, to be shipped to Liverpool and sold. The defendants pleaded never indebted, and the facts as set out in the special pleas in the statement of case. The learned judge left the evidence to the jury, as to whether it sustained the defendants' plea or not. The jury found for the plaintiffs. Upon motion for a new trial, the court being of opinion that the special plea of the defendants was not sustained by the evidence, the plaintiffs were entitled to recover on the common counts, and that there was no misdirection, the rule for a new trial was refused. *Palmer et al. v. Holmes et al.*, 194.

CONVENTIONAL LINE.

Of no avail against actual description.]—See TRESPASS, 2.

CONVEYANCE.

By sheriff under sale for taxes.]—See EJECTMENT, 4.

CONVICTION.

By magistrate.]—See MAGISTRATE.

By city magistrates for offence committed in county.]—See PERJURY, 1.

COSTS.

See ATTORNEY, 2.

Of defending suit for dower.]—See EXECUTOR, 2.

Revision of.]—See JUDGMENT.

Rule for payment of, on obtaining new trial.]—See NEW TRIAL.

COUNTY COUNCIL.

County council—Road lying between two townships—Jurisdiction over—Municipal Institutions Act.]—The first count of the declaration alleged that the defendants wrongfully cut away, removed and destroyed a bridge belonging to the plaintiffs, to wit, the bridge across the Grand River, on the line of road and public highway between the townships of A. and G. in the county of W. The second count alleged that there was and had been a line of road and public travelled highway between the townships of A. and G., which crosses the Grand River, in the county of W., such road being the line of road allowance between the townships aforesaid; and in order that the road might be travelled upon, the plaintiffs, in discharge of their duty, caused a bridge to be erected across the said river, where such bridge crosses the line of road, &c., and thereby facilitated the use, by the ratepayers of the said county and others, of the said line of road and highway: yet the defendants, well knowing the premises, but contriving to injure, &c., the plaintiffs, wrongfully and injuriously injured and cut down, &c., said bridge; and by means thereof it became the duty of the plaintiffs to rebuild the said

bridge; and in performance of such duty, plaintiffs have expended divers large sums of money, &c. The first count was demurred to on the grounds that the plaintiffs were not authorised by law to be, and were not, the owners of the said road and bridge, and were not entitled by law to maintain any action for the wrongs complained of, but that the remedy should have been by indictment, not by action. The second count was demurred to because it was not shewn that the road or bridge had been assumed by plaintiffs by by-law, or how the duty to rebuild the bridge arose, or that it was their duty to do so, and that they were not bound to do so. Two defendants also pleaded that the plaintiffs did not assume the road by by-law. To this the plaintiffs demurred, on the grounds that the plea raised an immaterial issue; that it attempted to put in issue matter not stated in the second count; that the defendants being wrong-doers, the absence of a by-law was no defence; that the plaintiffs had a property in and duty respecting the bridge without a by-law; that the absence of a by-law, if otherwise necessary, could not be taken advantage of by the defendants. *Held*, 1st, that by sec. 339 of the Municipal Act, the plaintiffs have exclusive jurisdiction over the bridge in question, and not a mere naked power; and having jurisdiction, the common law (irrespective of the statute) would impose upon them the duty of repairing it: they could therefore maintain the action, although section 336, which vest the soil and freehold of all highways in cities, towns, villages and townships in their respective municipalities, does not mention counties: 2nd, that the allegation in the first count, that the bridge belonged to the plaintiffs, was truly stated: 3rd, that the plaintiffs may have become the absolute proprietors of the bridge by purchase from a road company, and there was nothing to shew that they did not claim by such title in the pleadings, and that their title was sufficiently shewn in the pleadings. *The Cor-*

poration of Wellington v. Wilson et al., 299.

COUPON.

Stat. 24 Vic. ch. 83—Debentures issued under — Coupons appended to—Payable to holder—Choses in action.—The defendants, under the act 24 Vic. ch. 83, issued their debentures, payable in 1887, to which were appended coupons for interest, in the following form:

"\$40. Coupon No. 1. \$40. The Toronto Street-Railway Company will pay to the holder hereof, on the 1st July, 1862, at the Bank of Upper Canada, Toronto, forty dollars, interest due that day on bond No. 3. (Signed) ALEX. EASTON, *President*."

This action was brought by the plaintiff, as holder of several of said debentures, to enforce payment of the coupons for interest appended thereto, and a verdict was rendered for the plaintiff. On motion for nonsuit, on leave reserved, or for arrest of judgment, *Held*, 1st, That there was nothing on the face of the debentures to shew that in the issue thereof the company exceeded the powers conferred by the act above referred to; and that if it was sought to be contended that they had exceeded their powers, that that contention should have been raised by the pleadings. 2nd, That no evidence having been given at the trial to shew that the plaintiff was not the person to whom the debentures in question were given, or for whom they were intended by the company, it was to be presumed that the plaintiff was the proper person, and therefore the judgment could not be arrested. 3rd, The debentures were not void because they were not made payable to any particular named individual or company, as the legal effect of such an instrument must be construed to be an undertaking to pay the monies therein mentioned to the person to whom it was delivered, and who by the effect of such delivery became the payee in fact. 4th, As the plaintiff was not proved to have been the original bearer or

payee of the debentures sued upon, and they being choses in action and not assignable, this action could not be brought in his own name unless he shewed he was the bearer payee. 5th. That the debentures or coupons could not be considered promissory notes, as the company had no power to make promissory notes. *Geddes v. The Toronto Street-Railway Company*, 513.

COVENANT.

Breach of to repair.]—See LEASE, 1.

1. *Covenant—Breach—Eviction—Damages.*]—Upon an action brought for damages arising from breach of a covenant in a conveyance of land, the declaration alleged that the defendant conveyed the land (naming it) to one C. in fee, covenanting that he was seised in fee without any matter to charge, change, defeat or encumber the same, that C. mortgaged to the plaintiff; it was proven at the trial that in consequence of the defect of title, C. refused to pay his mortgage, upon which there was \$582 79 due. The defendant pleaded *non est factum*, and brought 1s. into court in satisfaction of the breach. A verdict being entered for \$686 76,—upon motion to reduce it to nominal damages, *held*, that no eviction having taken place, the plaintiff was only entitled to nominal damages. The decisions of this court in *Graham v. Baker*, 10 U. C. C. P. 427, and *Snider v. Snider*, 13 U. C. C. P. 157, were adhered to. *Bannon v. Frank*, 295.

2. *Covenant—Bond—Equitable plea—Defective Title.*]—The declaration was on a covenant contained in a mortgage, to which the defendant pleaded equitably that the plaintiffs gave their bond, binding themselves to execute a good and sufficient deed of the premises comprised in the said mortgage to the said plaintiffs and alleging that plaintiffs have not delivered to defendant a deed in fee simple, &c., and averring that the plaintiffs had not at the time of giving their bond, nor at any

time since, a good title to the said land, &c., to which the plaintiffs demurred. *Held* that the plea was bad, as it did not shew what defect there was in the plaintiff's title, nor that the plaintiffs' bond would not fully indemnify defendant against loss, nor that there was any fraud or misrepresentation; and as this court could not do ample justice between the parties, they would not interfere. *Dauphin et al v. Lesperance*, 133.

CREDITOR.

See ABSCONDING DEBTOR, 1.

CUSTODY.

Proper custody to render deed admissible without proof.]—See DEED, 2.

DAMAGES.

On covenant before eviction.]—See COVENANT, 1.

On breach of covenant to repair.]—See LEASE, 1.

Measure of in action on promissory note.]—See PROMISSORY NOTE, 1.

Occasioned by writ of replevin.]—See REPLEVIN.

When new trial to review granted.]—See TRESPASS, 1.

DEBENTURES.

Coupon appended to.]—See COUPON.

DECLARATION.

Counts in.]—See INSURANCE, 1.

DEED.

Execution of by power of attorney.]—See CANADA COMPANY.

Improper recitals in.]—See EJECTMENT, 2.

Alterations in.]—See EJECTMENT, 3.

Mortgage by deed poll.]—See EJECTMENT, 5.

Secondary evidence of, when admissible.]—See EJECTMENT, 8.

1. *Deed—Loss of—Secondary evidence of—Memorial—Executed by grantee—No evidence of deed.*—*Held*, that before secondary evidence can be let in, in reference to a deed supposed to have been lost, proof must first be adduced that such supposed deed *once* existed, and that it has been destroyed or lost, and diligent search made therefor; and on the authority of *Gough v. McBride*, 10 C. P. U. C., a memorial executed by the grantee, *held* to be no evidence of the deed to which it was supposed to relate. *Ansley v. Breo et al.*, 371.

2. *Ancient deed—Proper custody—Married woman's certificate—Presumption as to when thirty years old—Demand of possession.*—An action of ejectment. The plaintiff claimed title from the patentee of the Crown. The defendant relied on a former deed executed in 1813 by the patentee, (a married woman,) on which was endorsed a certificate of her separate examination by Chief Justice Scott, and her consent to part with her estate therein. *Held*, that an ancient deed produced by the son of the executor of the grantee of the patentee of the Crown, and proved to have been found among the testator's papers, was a proper custody in point of law to render its mere production evidence, the deed being more than thirty years old. *Held*, that the deed of 1843, (under which plaintiff claimed) rather than the ancient deed, carried with it the imputation of fraud, and the production and proof of it did not necessitate the calling of the subscribing witnesses to the old deed if living, or proving their signatures if dead. As to the objection that possession of the land did not accompany the ancient deed, *held*, that there was no evidence of any adverse possession to the grantee, and the deed having come from the proper custody untainted with fraud, and possession having gone along with it, there was no reason to impeach it on the ground that possession did not accompany the ancient deed. That there was nothing in the evidence to warrant

the suggestion that some one personated the patentee before the Chief Justice, except her own denial; and that the smallness of the consideration was a fair subject of remark to negative the truth of such a suggestion. That the record in ejectment in a former trial substantially between the same parties, was properly admitted as evidence, and that all that could be inferred against the plaintiff's right to recover at that time, and the defendant's right to possession, were proper inferences from the production of the record. As to the objection that no evidence was offered of the facts to which the married woman's certificate related, further than the presumptive evidence arising from its antiquity, and that the certificate itself afforded no proof of the facts certified, *held*, that from the certificate it was to be presumed, *prima facie*, that every thing was done by the judge, who made the same, to justify him in certifying what he professed to certify. As to the objection that upon the evidence given of the acknowledgment under seal, executed by J. P., (through whom the defendant claimed,) the only verdict sustainable must be for the plaintiff, *held*, that the acknowledgment created a tenancy from month to month; and that the plaintiff could not have recovered without proof of the determination of the tenancy. *Seem*, that the judge at the trial should have prevented the plaintiff setting up a case in reply, which he did not set up at first as his case. *Orser v. Vernon*, 753.

DELIVERY.

Of goods.—*See* CHATTEL MORTGAGE.

DEMAND.

Of possession.—*See* DEED, 2.

DEMURRER.

To declaration.—*See* INSURANCE, 1.

To pleas justifying libel.—*See* LIBEL.

DESCRIPTION.

Of goods in chattel mortgage.]—
See CHATTEL MORTGAGE.

DEVASTAVIT.

Suggestion of against executors.]—
See EXECUTORS, 1.

DIRECTORS.

Liability of.]—See CANADA AGENCY ASSOCIATION.

DISCHARGE OF MORTGAGE.

Not an estoppel.]—See PROMISSORY NOTE, 4.

DISTRESS.

Action for illegal.]—See] TRESPASS, 4.

DIVISION COURT.

Lands sold under transcript from.]—
See EJECTMENT, 1.

Action in Division Court for goods—Cause of action—Where same arose—Writ of prohibition.]—On an application for writ of prohibition on the ground that the cause of action did not arise within the jurisdiction of the judge of the county of Lambton, held, that where the defendant resided at G., at which place a bargain was made for the delivery of certain goods at W., and the bargain was fulfilled by such delivery and acceptance, that the cause of action arose partly at G. and partly at W., the judge of the County where W. is situate had no authority in respect of the cause of action. In the matter of the Judge of the County Court of the County of Lambton, in a cause in the First Division Court of that County, of Kemp v. Owen, 432.

DOWER.

Payment of by executors.]—See EXECUTORS, 1.

Right to recover costs of suit for from executor.]—See EXECUTOR, 2.

Release of when not signed by woman.]—See EXECUTOR, 2.

Dower—Action for—Estate of tenants.]—Held, that the defendants, executors, under the will of N. S. devising "all and every the messuages and tenements whatsoever, whereof or wherein I have or am entitled to any estate of freehold or inheritance, by virtue of any mortgage or mortgages, unto and to the use of my executors (the defendants) to the intent, &c.," took such an estate in the land in question as to make them liable in an action for dower. Low (Demandant) v. Sparks et al. (Tenant), 25.

EJECTMENT.

1. *Ejectment—County Court—Fi. fa. lands—Attachment—Division court judgment.]—Ejectment having been brought to recover the possession of premises sold and conveyed by the sheriff to the plaintiff under a writ of *venditioni exponas*, issued upon a county court judgment, based upon a division court judgment, recovered on proceedings commenced by attachment and summons issued the same day. The transcript of the judgment of the division court not however shewing that the proceedings were commenced by attachment. Held, that the sale under the writ of *venditioni exponas* was void, by reason of the transcript of the judgment from the division court not having shewn that the proceedings in that court were commenced by attachment. Hope v. Graves, 393.*

2. *Ejectment on sheriff's deed—Improper recitals in—Purchaser not estopped by.]—An action of ejectment on a sheriff's deed which recited "That by a *ven. ex.* I have seized as the lands of A. M. that certain tract, &c., and whereas the said premises since the seizure by me, made by virtue of the said writ of *ven. ex.*, after due notice, were exposed to public sale," &c., and then granted to the purchaser. It appeared that the lands had been seized under a writ of *fi. fa.* pre-*

vously issued, and placed in the sheriff's hands, and that the *ven. ex.* ordered him to expose to sale and sell the lands so seized. *Held*, that the misrecitals of the acts of the sheriff in the deed did not invalidate the deed itself; that the purchaser was not nor were the plaintiffs estopped by such recitals, and therefore plaintiffs might shew what the facts were; that recitals did not exclude the presumption of a proper seizure on the *fi. fa.* That as the debtor attorned to the purchaser the defendants could not impeach the purchaser's title so long as she retained the possession of the person making the attornment. This decision is not inconsistent with that in the same case reported in 13 U. C. C. P. 189. *Roe et al v. McNeill et al*, 424.

3. *Ejectment—Statutes of Limitations—Maintenance—Alterations in deed—Cancellation of deed—Memorandum by witness—Witness refreshing his memory—“Assign” sufficient to pass fee in land—Infant having title and living on land to be deemed in possession.*—One A. F. being the owner of a full lot of 200 acres, in 1823 conveyed the west half thereof to his son I. in fee, who went into possession. In 1827 or 28, I. removed from the lot and died out of the actual possession in January, 1829 or 30, leaving a son R. born in 1824. After I.'s removal from the lot, A. F. took possession. On the death of I., A. F. brought I.'s son R. to live with him on the land, where he continued to reside till A. F.'s death in 1841. In March, 1839, A. F. made a conveyance of the west half to another son of his, N. P. F., in fee, who went into possession and died thereon in March, 1841, devising same to his son J. F., one of the defendants. The mother of J. F. married one L. and continued to reside on the lot with her husband till 1848 or 49. After A. F.'s death the deed to I. was found among his papers with the seals torn off. In 1847 R., the son of I., brought ejectment against L. and wife for this west half, which

suit was compromised by R. agreeing to convey in fee to J. F., the son of N. P. F., the west half of the said west half, and by L. on behalf of J. F., agreeing that J. F. should, on his coming of age, convey in fee to R. the east half of said west half of lot. R. conveyed the portion to J. F. but J. F. never conveyed to R. the east half of west half, the subject of this action. In 1847, after this settlement, R. conveyed the portion in question to one D. R. through whom plaintiffs claim, while L. and wife were in possession of the lot. *Held*, 1st. That the nature of A. F.'s possession was for the jury to determine. 2nd. That while R. was living with A. F. on the land he could not be treated as out of possession. 3rd. That the sale made by R. while L. was in possession, but after the compromise, and after L. had acknowledged R.'s title, was not void for maintenance. 4th. That the cancellation of a deed does not divest the estate which has passed by it. 5th. That the erasure of the date is not to be presumed to have been made after execution; but even if it were, the deed is good by its delivery. 6th. That a witness may, to refresh his memory, refer to a memorandum made near the time when the event occurred, when the fact was fresh in his mind. 7th. That “assign” is a good operative word to pass the fee. *Fraser et al. v. Fraser et al.*, 70.

4. *Ejectment—Conveyance by sheriff under sale for taxes—Misdirection—Avoiding deed for alleged fraud in making a false statement at such sale.*—The defendants claimed title through one W. McC., who claimed by deed under a sale for taxes from the sheriff. On the trial it was proved that W. McC. claimed the lot in question, at the sale for taxes; and, alleging his title was imperfect, he asked the audience not to bid against him, which request they complied with, and he became the purchaser thereof for £4 or £5. The judge who tried the cause, left it to the jury to say, first, whether McC. made the statement mentioned; and, secondly, if, in consequence

thereof, there was no competition for the lot; directing them that if they found in the affirmative, their verdict should be for plaintiffs. The jury found for the plaintiffs, and that McC.'s statement was false, and in consequence he purchased without competition. On motion to set aside the verdict for misdirection, *Held*, that the sheriff having duly conveyed the land by deed to McC., the legal estate thereby passed, and, if it is sought to impeach the deed for fraud, the case must be taken before a court of equity, whereby complete justice could be done to all parties concerned. *Raynes and Wife v. Crowder et al.*, 111.

5. *Ejectment—Deed poll—Mortgage—Legal estate passed.*—*Held*, that a deed poll to secure a sum of money, in which the words passing the estate were "mortgage all that certain parcel of land, &c., to have and to hold the aforesaid land unto the said J. R., his heirs, executors, administrators and assigns," was sufficient to pass the right of possession to the grantee. *Vandelinder v. Vandelinder*, 129.

6. *Ejectment—Contract for sale of land—Possession entered into by purchaser—Default in payment by purchaser—Tenant at sufferance.*—Plaintiff, being in possession of land as assignee of a mortgagee, under a mortgage upon which default had been made, contracted to sell the mortgage to defendant for \$500: \$200 at date of agreement, and \$300 on the 1st April following; at which time the plaintiff agreed to have the mortgage assigned to defendant. On payment of \$200, the defendant was let into possession by the plaintiff. Default was made by defendant in payment of the second instalment of \$300. Plaintiff gave notice to the defendant that he was ready to assign mortgage on the payment of the amount due, and that if the money were not paid defendant would be ejected. Defendant refused payment, and said he would stand a suit, and claimed a deed in fee with covenants for title. *Held*, that by default in payment the ten-

ancy at will was converted into a tenancy at sufferance, and that as well on account of defendant being only a tenant at sufferance as on account of his disclaimer of the plaintiff's title, he was not entitled to a demand of possession before action brought, and also that the tenancy at will would have been determined by the demand of payment under the threat of ejecting the defendant and the default of the defendant to pay. *Prince v. Moore*, 349.

7. *Ejectment—Possession—Voluntary conveyance—Subsequent purchaser for value.*—In an action of ejectment, brought to try the title to parts of lots 4 and 5 in broken front and first concession of Sidney, both parties claimed title through one N. M. The defendant contended that a deed from N. M. to C. & J. M., dated 12th September, 1838, was voluntary, and was therefore void. The jury having found for the plaintiff, upon motion for a new trial, *Held*, that the deed from N. M. to C. & J. M. could only be void as against a subsequent purchaser for value, and that inasmuch as there was evidence to shew that C. & J. M. were in possession on the 31st of August, 1839, and none which proved either the grantor or grantee to have been in possession when N. M. conveyed to A. H. M. (through whom defendants claimed), the deed to A. H. M. was therefore void, and he was consequently precluded from saying the deed to C. & J. M. was void because it was voluntary. *Weller v. Hargraves et al.*, 360.

8. *Ejectment—Lost deeds—Secondary evidence of—When admissible.*—Ejectment on sheriff's deed. To prove a deed from the sheriff the memorial was put in, it having been shewn by B. (a partner of W. D., the said W. D. having formerly been partner of J. D., then attorney for the plaintiffs), that the deed had come into the office of J. D. (J. D. not being called), and could not be found there on diligent search by B. It being objected that the plaintiff's attorney, to whose hands the sheriff's deed was traced, should

have been called; also, that there was no evidence of there being any power of sale in the mortgage, by the exercise of which the deed produced purported to be executed: *Held*, that objections not taken at the trial could not be considered when raised by rule; that diligent search by B., who was partner with W. D., the former partner of J. D., with whom the deed had been left, the said B. having succeeded J. D. in the business, and having access to all his papers, and having seen the deed in his office lately, was sufficient search to admit of secondary evidence without calling J. D.; that the estate in the mortgage having become absolute at law in the mortgagee, there was no necessity for shewing that there was a power of sale in the mortgage to convey the legal estate. *Semble*, that the recital in a deed proved is sufficient evidence of contents of a mortgage, so far as therein recited. *Nesbitt v. Rice*, 409.

9. *Ejectment—Mortgage—Condition in—Right of entry.*—The plaintiff in this cause brought an action of ejectment to recover possession of certain premises mortgaged to him by defendant's father, the condition of which mortgage was broken. Upon the trial it appeared that the plaintiff, by a mortgage dated 1st October, 1861, had conveyed the premises to one P. L. to secure him for endorsing certain promissory notes, the condition of the mortgage being, that the said mortgage should be void on payment of the said notes, and contained a recital that the notes might be renewed, but only three times or for a year, which the said P. L., the mortgagee consented to. It appeared that the notes had been renewed from time to time, and no longer than the period allowed by the proviso, and were afloat at the commencement of this suit. The defendant objected that the condition of the mortgage was broken, and that the right of action was vested in P. L. the mortgagee. A verdict having been taken for the plaintiff, with leave to the

defendant to move to enter a nonsuit. Upon motion *held*, that the notes not having been paid within the year, the condition of the mortgage was broken, a nonsuit was therefore ordered to be entered. *McMahon v. Fard*, 433.

10. *Ejectment—Lost fi. fa. lands—Secondary evidence of, when admissible—Nonsuit.*—An action of ejectment. The plaintiff's title rested on a deed from the sheriff, and at the trial he was non-suited for not producing or accounting for the non-production of the *fi. fa.* lands under which the sheriff sold. On motion for new trial on the ground of the rejection of secondary evidence and mis-direction, *Held*, that the plaintiff was properly nonsuited, in not having given sufficient proof of the loss of the *fi. fa.* to admit of secondary evidence. That every place should have been searched where there was reasonable ground to suppose that the *fi. fa.* might be found; that some of the sheriff's papers having been left in the court house, search should have been made among them before secondary evidence was admissible. That affidavits having been filed that diligent search had since been made in the court house, a new trial would be granted on payment of costs. *Soules v. Donovan*, 510.

ELECTIONS.

Proceedings to unseat Aldermen duly elected.—See QUO WARRANTO, 1.

EMBEZZLEMENT.

Prosecution for.—See MALICIOUS PROSECUTION.

ENLARGEMENT.

Proceedings stayed by. See SUMMONS.

EQUITABLE PLEA.

See COVENANT, 2.

ERROR AND APPEAL.

Error and Appeal—Practice—U. S. U. C. c. 13.]—No writ of error or appeal is required. Sec. 32 of the Act respecting the Court of Error and Appeal, which abolishes the writ, supersedes the orders of the Court of Appeal under which the writ was given, notwithstanding the provision in sec. 64, affirming the orders of the court until altered. After security has been allowed, under sec. 35, without objection by the respondent to the want of the proceedings required by secs. 33 and 34, the court will not rescind the allowance of the security, and permit the respondent to proceed on his execution, on the ground of those proceedings not having been taken. The neglect by the appellant to take the proceedings mentioned in secs. 36 and 37, is no ground for rescinding the allowance of the security. In cases where judgment of *non pros.* is authorized by sec. 39, it is not necessary to obtain leave of the court to sign it. The statute and orders of the Court of Appeal afford the respondent the means of pressing a case to a hearing. *Rowe v. Jarvis*, 244.

ESTOPPEL.

Purchase not estopped by recital in sheriff's deed.]—See EJECTMENT, 2.

Where cause of action had been set up as a defence previously.]—See PLEADING.

Discharge of mortgage not an.]—See PROMISSORY NOTE, 4.

EVICITION.

On breach of covenant, special damages not recoverable till.]—See COVENANT, 1.

EVIDENCE.

In action by sheriff for rent under statute.]—See ABSCONDING DEBTOR, 2.

Of, for an account stated.]—See ACCOUNT STATED.

Secondary of deed, when admissible.]—See DEED, 1, 8.

Secondary evidence of ft. fa. when allowable.]—See EJECTMENT, 10.

Weight of.]—See INSURANCE, 2.

Rejection of.]—See INTERPLEADER, 2.

On indictment for obtaining money by false pretences.]—See MISDEMEANOR.

In criminal prosecution.]—See RAPE.

Verdict against, form of rule.]—See STEAMBOAT.

Evidence—Taken by commission—Must be enclosed under hand and seal of commissioner—Affidavit verifying the proper taking of.]—

At the commencement of the trial of this case the counsel for the defendant not being present, the counsel for the plaintiff opened his case, and put in and proceeded to read evidence taken under a commission at Montreal. While it was being read, the counsel for the defendant appeared and objected to the commission, as the envelope enclosing it was not under the hand and seal of the commissioner, and because there was no affidavit of verification thereof. On the suggestion of the judge who tried the cause, the plaintiff took a nonsuit, with leave to move to set the same aside; on motion. *Held*, that under sec. 21, ch. 22, Con. Stat. U. C., the examination of a witness taken without the limits of Upper Canada, must be proved by an affidavit of the due taking thereof, sworn, &c., and must be returned close, under the hand and seal of the commissioner. *Reford v. Macdonald et al.*, 150.

EXCHANGE ON NEW YORK.

In an action on an account stated.]—See ACCOUNT STATED, 2.

EXECUTION.

1. *Writ of execution—Sale of goods by sheriff thereunder—Memorandum in writing or delivery necessary—17th section of Statute of*

Frauds.]—*Held*, that a sale of goods and chattels by a sheriff, under a writ of execution, comes within the 17th sec. of the Statute of Frauds, and requires a memorandum in writing or a delivery of the goods sold to bind the sale. And in this case, where the purchaser merely signed a memorandum in a book, acknowledging the amount of his bid for goods sold by the defendant, and no memorandum was signed by the auctioneer, it was held insufficient to entitle the plaintiff to bring this action against the defendant for refusing to complete the sale.—*Mingaye v. Corbett*, 557.

2. *Writ of execution—Renewal of*—27 Vic. sec. 2, ch. 13.]—*Held*, that that the 2nd section of ch. 13, 27 Vic., is not retrospective in its operation, and under the authority of *Neilson v. Jarvis*, decided in this court, all writs of execution more than once renewed previously to the 15th of October, 1863, the date of the said act, are void. *Miller v. The Beaver Mutual Fire Insurance Association*, 399.

EXECUTORS.

1. *Liability of executors of surety for sheriff.*]—See SURETY FOR SHERIFF.

2. *Executors—Devastavit—Fraud—Dower.*]—The defendants, as executors of Zimmerman, having given the Bank of Upper Canada, on the 28th of April, 1858, a confession of judgment for £217,637 9s., upon which judgment was entered; and the plaintiff in this action having recovered a judgment against the defendants, as executors of the same estate, for £4,912 15s. 8d., on which execution had been issued against the goods and chattels which were of Zimmerman in his lifetime, in the hands of the defendants, as executors, to be administered, which had been returned *nulla bona*, alleged a *devastavit*, to which the defendants pleaded that they had not eloiigned, wasted, &c. 2nd. On equitable grounds, that the judgment was by confession; that at the time of the

giving of the confession, it was agreed that the confession and judgment, to be thereupon entered, should be no admission of assets in their hands; they then pleaded the judgment recovered by the Bank of Upper Canada (as in *Commercial Bank v. Woodruff et al.* 13 U. C. C. P. 621), and that they have fully administered, except £4,000, which is not sufficient to satisfy the Bank of Upper Canada's judgment. The plaintiff replied that the judgment of the Bank of Upper Canada was recovered by fraud and covin, and with intent to defraud plaintiff of his debt, and that they have not fully administered. *Held*, that under the pleadings the plaintiff did not dispute the defendants' right to keep the £4,000, to be applied on the Bank of Upper Canada judgment, but complained that the defendants have not otherwise fully administered. The complaint being the settlement of Mrs. Zimmerman's dower, which being decided in defendants' favour in the *Commercial Bank v. Woodruff*, 13 C. P. U. C. 621, the case is thereby disposed of, and the defendants are entitled to judgment. *Hamilton v. Woodruff et al.*, 22.

2. *Executor—Dower—Costs of defending suit for.*]—In an action brought against the executors of a grantor in a full covenant deed, to recover damages sustained by the plaintiff, by reason of the payment of a sum of money on an action for dower, the defendant pleaded the deed was not the deed of Thomas Johnson in his lifetime, and *plene administravit*. To the first plea the plaintiff joined issue, and to the second replied lands. It appeared on the trial that an action had been brought against one G. S. B. for the recovery of this dower, and a release obtained for \$120; but not until after a defence and some £20 of costs were incurred, and that the only amount paid by plaintiff was \$50. Upon this the defendant's counsel contended that the \$50 was all plaintiff could recover. The learned judge directed a verdict for the £30, and

left it as question for the jury to decide whether the costs of defending the dower suit should be allowed. The jury found for the plaintiff, giving \$240 damages. Upon motion for a new trial *Held*, that the jury should have been directed that the defence of the dower suit was not justifiable, the deed containing the release of dower executed in May, 1835, not being signed by the wife, although certified to by two magistrates, and the costs thereof should have been disallowed; and that the plaintiff was only entitled to recover the amount paid for the release of dower and interest. The verdict was therefore ordered to be reduced to that amount, otherwise a new trial to be had. *Hunter v. Johnson, (Executor)* 123.

3. *Judgment against executor — Action on — Plene administravit — Replication lands — Effect of.*—Action on a judgment recovered against an executor. The declaration set out a judgment recovered; alleged the issuing of a *fi. fa.*, and a return "*nulla bona*," and suggested a devastavit. Plea, that in the action on which this action is founded, the defendant pleaded *plene administravit*; that the plaintiff replied lands, on which judgment was given; that the lands were assets in the hands of the defendant as executor. The defendant then avers that the lands are sufficient, and that plaintiff has not proceeded against them. Demurrer to pleas, on the ground that where a judgment has been recovered, and a devastavit is shown, it is not a sufficient reason to excuse the defendant from personal liability, that the plaintiff has obtained a judgment to recover of the lands of the testator. *Held*, that the replication of lands is a full admission of the truth of the plea of *plene administravit*; that the plaintiff, by his replication in the former action, being estopped from setting up a devastavit now, the defendant is at liberty to show the true state of the case, to save himself from personal liability; that the replication (of lands) commonly used since

Gardiner v. Gardiner, is both illogical and unnecessary. *Hogan v. Morrissey*, 441.

FL. FA. (LANDS.)

On Division Court transcript.—*See* EJECTMENT, 1.

Secondary evidence of when lost.—*See* EJECTMENT, 10.

Not renewable more than once before 27 *Vic. ch. 13.*—*See* EXECUTION, 2.

FOREIGN CONTRACT.

Contract—To be performed in the United States—How payable—Greenbacks.—The defendants reside at Toronto, in Canada; and one of them, when at Cleveland, or, as plaintiff contends, at Toronto, wrote to plaintiff, who resides in Cleveland, as to coal; to which letter the plaintiff replied, and addressed his letter to the defendants at Toronto, agreeing to furnish coals at Cleveland at \$2 75 per ton. *Held*, that the place where the money is payable governs the question as to how it is to be paid; and as the goods were to be delivered at Cleveland, it is to be presumed they were also to be paid for there on delivery, and that therefore plaintiff must accept American currency in payment thereof. *Crawford v. Beard et al.*, 87.

FOREIGN ENLISTMENT ACT.

Stat. 59, Geo. III. ch. 69—Enticing persons to enlist.—The defendants having been convicted of a misdemeanor under Imperial statute 59 Geo. III. ch. 69, for procuring and endeavouring to procure enlistments in this country for the army of the United States, upon motion for a new trial, *Held*, that that statute is in force in this Province, and the conviction was sustained. *Regina v. Schram et al.*, and *Regina v. Anderson et al.*, 318.

FORGERY.

Forgery—Indictment for—22 *Vic. ch. 94—Con. Stat. C. ch. 99—Con.*

Stat. U. C. ch. 112.]—In an indictment for forgery, the third count alleged that the prisoner afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off, a certain other forged instrument in writing, which said last mentioned forged instrument in writing was as follows:

“Glanford, January 29, 1864.

“I, John Hostine, do agree to Wm. Carson, of Warstead, Plymp, the full rite and privilege of all the white oke and elm and hickory lying and standing on lot 26, south part, on the third concession Plymp, for the sum of thirty dollars, now paid to Hostine by Carson, the receipt whereof is hear by me acknowledged.

“JOHN HOSTINE.”

With intent thereby to defraud; he, the said William Carson, at the time he so uttered and published the said last mentioned forged instrument as aforesaid, well knowing the same to be forged, against the form of the statute in such cases made and provided, and against the peace of our lady the Queen, her crown and dignity. The jury having convicted the prisoner, his counsel moved in arrest of judgment on the grounds, 1st, that the third count (set out above) did not give the instrument alleged to be forged any name, description or designation; 2nd, that the instrument set out in the third count was insensible, and that there were no averments explaining it; 3rd, that the third count concluded *contra formam statuti*, and that there was nothing in it to shew that the offence was against any statute; 4th, that the count was otherwise bad, and bad at common law, and that there was no allegation of intent to defraud any person, and that no judgment could be pronounced upon it. The learned judge having overruled the objections, upon a case reserved for the opinion of this court, under chap. 112 Con. Stat. U. C.: *Held*, 1st, that the instrument forged being set out *in hæc verba* in the indictment, the description of its legal character would be surplusage and unnecessary; 2nd, that under sec.

29 Con. Stat. C. ch. 99, it is not necessary to allege an intent to defraud in an indictment for forgery; 3rd, that the averment of the offence being *contra formam statuti*, was of no importance, for if the offence was one against the statute it was sufficiently proven, and if not against the statute, but an offence at common law, the allegation was immaterial and unnecessary to be proven; 4th, that the instrument might be construed as an agreement or contract to sell the timber or a receipt for the payment of money, and in either case came within the statute 22 Vic. ch. 94. *Regina v. William Carson.*

FRAUD.

How far avoids sheriff's sale for taxes.]—See EJECTMENT, 4.

Statute of (sheriff's sale within)—See EXECUTION.

Replication of judgment recovered by.]—See EXECUTORS, 1.

Statute of.]—See TRUSTS.

See GUARANTEE.

GREENBACKS.

Contract to be performed in U. S. payable in.]—See FOREIGN CONTRACT.

GUARANTEE.

Guarantee—Statute of Frauds—Consideration of guarantee—It must be stated—Must be in writing.]—On an action brought by plaintiff against defendant on the following document, “I hereby guarantee to pay W. H. &c., \$10 per month until the sum of \$300 due by Messrs. B. & H., &c., shall be paid, &c. Signed, M. M.” (the defendant.) *Held*, that the consideration therefor, not appearing on the face of the guarantee or not to be implied therefrom, it came within the Statute of Frauds, being a promise to pay the debt of another without any consideration, and was therefore void. *Palsgrave v. Murphy*, 153.

HARBOUR DUES.

On vessels carrying firewood.] See MUNICIPAL INSTITUTIONS, 1.

INDICTMENT.

For forgery.—See FORGERY.

For obtaining money by false pretences.—See MISDEMEANOR.

For perjury.—See PERJURY, 2.

INSURANCE.

1. *Declaration—Counts in—Form of—Demurrer—Policy of Assurance—Two properties contained in—One of which is under mortgage—Con. Stat. U. C. ch. 52, ss. 27, 67.]*

—Declaration stated that by policy dated 29th May, 1861, the defendants insured plaintiff against loss by fire in the sum of \$1,200 on stock of hardware, &c., contained in a frame building situate on the west side of Water-street in Galt, at 20 per cent., and also that by policy of 28th June, 1861, defendants insured plaintiff on stock of hardware, &c., in a building situate on the west side of Water-street in Galt, to the amount of \$1,200 at 20 per cent. On his two-story dwelling house, &c., situate on the east side of Hunter-street, \$800, and on household furniture contained therein \$800 at 5 per cent., making in all \$2,800, and averred that from the making of the policies the plaintiff was interested in the premises and stock till the time of the fire, when he sustained a loss of \$6,000, and averment that all things necessary had been performed by plaintiff to entitle him to bring this action. The 5th plea averred that as to the second policy, at the date thereof, the stone dwelling house, &c., mentioned therein, was under mortgage to one W. D., and that plaintiff gave no notice thereof to the defendants, nor procured said mortgage to be noticed in the policy as required by law, &c., whereby said policy is void. To which plea plaintiff demurred, and assigned as causes of objection that the said second policy is divisible, &c., and that a mortgage on said dwelling house does not affect plaintiff's right to recover in respect of the stock, &c.; that said plea confesses and does not avoid plaintiff's cause of action. The defendants

excepted to *first* count of declaration that plaintiff did not allege therein that he was interested in the stock, &c., at the time of loss or at any other time, or that said stock was at any time injured or destroyed by fire, nor did it allege any breach of duty by defendants. *Held*, 1st. That the declaration framed as above must be considered as containing two counts, and that the same is good in form, as the general allegation at the end thereof must be considered as referring to the whole declaration. 2nd. That when a policy covers two or more distinct properties, each of which is insured thereby for a specific sum and at a fixed rate respectively, the said policy must be considered as divisible, and therefore the fact of one of said properties having, at the date of the policy, been under mortgage, whereby the assured had an estate therein lesser than a fee simple, or said property was encumbered, does not affect the right of the assured to recover against the insurers in respect of the other properties mentioned in the policy, though no notice had been given to the insurance company at the time of application of one of such properties being under mortgage, and though no notice was by plaintiff procured to be made of such mortgage in such policy as required by ch. 52, Con. Stat. U. C., ss. 27, 67. *Date v. The Gore District Mutual Fire Insurance Company*, 548.

2. *Action on a policy—Increased risk—Weight of evidence—New trial.*—Action on two policies of insurance. Pleas—That the plaintiff was not interested; that the risk was increased and rendered more hazardous after the insurance was effected. On motion for a nonsuit, on the ground of the verdict being against evidence, the defendants having substantiated their plea, that the condition against alteration in the premises had not been complied with; or for a new trial, on the grounds that the verdict was against evidence, and the weight of evidence. *Held*, that the *onus* being on the defendants to establish the alterations and increased risk, the judge

could not nonsuit on the plaintiff's evidence, being contradictory in that respect; that from the facts disclosed in the judge's notes, the court would not order a nonsuit; that the verdict was not against evidence, though perhaps against the weight of evidence; that there should be a new trial, to explain the question of increased risk. *Date v. Gore District Mutual Fire Insurance Company*, 502.

3. *Insurance—Proof of loss—Giving of under oath—Statement of title—When necessary—Pleading.*]—Declaration on a policy of insurance granted by the defendants to the plaintiff, alleging loss, and notice, and as soon as possible thereafter, and within thirty days, the delivery of particulars, signed, and all the declarations made on oath, and an account verified by the oath of the plaintiff, and shewing no other insurance on the premises. The 5th plea stated the condition by which the insured is required to give a particular account under oath, and to state whether and what other insurance existed upon the premises at the time of the fire, and that plaintiff, although he had delivered his account, yet he had hitherto neglected to inform defendants whether any and what other insurance existed. The 6th plea alleged that the property insured was encumbered by a mortgage, and that the plaintiff did not truly state his title to the land. The plaintiff replied to the 5th plea, that no other insurance was effected on the property insured; and to the 6th, that the title to the land was not encumbered. Upon demurrer to these replications and exceptions to the pleas, *Held*, that inasmuch as the defendants, in the 5th plea, did not complain of the plaintiff's not having made a declaration upon oath, but that he had neglected to inform them as to whether there was any other insurance, the traverse did not come within the condition of the policy, and the 5th plea was bad. *Held*, also, that the 6th plea was fully answered, the allegation of title of the insured being owner in fee of the

land not being necessary, and the encumbrance being traversed. *Williamson v. The Niagara District Mutual Fire Insurance Company*, 15.

4. *Insurance—Agent—Undertaking of to insure—Breach of Policy—Pleading—Con. Stat. U. C. ch. 52, sec. 30.*]—The plaintiff declared against the defendant as agent of an insurance company, alleging that he being the owner in fee of certain premises, subject to a mortgage, had employed the defendant to effect an insurance thereon, according to the rules of the company, but that he (the defendant) had so carelessly and negligently effected such insurance, that a loss by fire having occurred, he (the plaintiff) was prevented, by reason of the careless conduct of defendant in effecting the insurance, from recovering the amount thereof, and was put to great trouble and expense in and about the bringing an action therefor. The defendant pleaded an assignment by plaintiff to one Graham, the owner in fee, by virtue of a mortgage before the fire and before the action was brought. To this the plaintiff demurred. The defendant also took exception to the declaration on the following grounds: 1st. The amount and duration of the policy are not shewn; 2nd. No negligence by defendant is shewn; 3rd. That no reason was stated why the policy was bad, or that the defect was within the defendant's undertaking; 4th. No agency between plaintiff and defendant shewing the latter being agent for the company, nor any reward or consideration averred for the undertaking; 5th. That the breach is larger than the promise. *Held*, first, that the assignment of the policy by the plaintiff to Graham was no more than an assignment of an ordinary chose in action, upon which the action must be enforced in the assignor's name. 2nd. That the declaration (set out above) being for a *misfeasance*, did not require an allegation of a consideration or reward to support the action; but the defendant having undertaken to do, and having done an act gratuitously,

was liable for his *misfeasance* in the performance of his undertaking. 3rd. That the defendant, after pleading over, could not object to the want of allegation in the declaration of the amount or duration of the insurance; and lastly, that the defendant was entitled to judgment for the insufficiency of the count, because negligence generally is different from negligence to insure according to the rules of the company. *Johnston v. Graham*, 9.

5. *Insurance—Lease—Forfeiture—Condition on policy—Increase of risk.*—A new action having been brought on this policy, alleging a total loss by fire, the defendants pleaded a condition of the policy as set out in 13 C. P. U. C. 99, on which the judgment, as given in the former case, was adhered to. The defendants further pleaded that the British American Land Company, of which company the plaintiff is commissioner, had, before the policy, leased the property to one Lomas, who had covenanted to insure and keep insured, and that Lomas, as lessee, made additions to the buildings which increased the risk, and that such increased risk was within the control of the land company as lessors, whereby the policy was avoided according to one of the conditions endorsed. *Held*, that these additions, made by a lessee, were not within the control of the lessors. *Held*, also, that the provision in the lease that the lessee should not make alterations "in the arrangement of the mill or machinery," was not a prohibition from putting up additional building; but if it were, the defendants had no right to resist payment of the insurance, because the landlord might have a right of entry for a forfeiture by the tenant. *Heneker v. The British America Assurance Company*, 57.

INTEREST.

Rate recoverable on note after due.—See PROMISSORY NOTE, 1.

INTERPLEADER.

1. *Interpleader issue—Con. Stat. U. C. cap. 26, sec. 18—Bona fide sale in the ordinary course of trade*]—An interpleader issue to try the right of the plaintiff to property seized by the sheriff on execution issued by the defendant against C. The plaintiff claimed by purchase prior to the defendant's execution. The judge directed the jury to find (1) whether the purchase by the plaintiff was to defeat or delay the creditors of C (2) was the sale *bona fide*. (3) Was there an actual and continued change of possession. On motion for a new trial for verdict being contrary to law and evidence and for mis-direction. *Held*, that the jury might have found for the defendant, and such a finding would have been more satisfactory, yet as the case went fairly to them, and the amount involved was small, the verdict should not be disturbed. 2nd, As to mis-direction. That under Con. Stat. U. C. cap. 26, sec. 18, a sale of goods for cash would not be void, where a similar sale would not be an act of bankruptcy in England, and that the sale in question would not have constituted such an act there. The words, "in the ordinary course of trade," &c., were inserted in our statute by way of greater precaution to protect the ordinary dealings of parties having mutual accounts where the party selling was not known to be insolvent. That the evidence did not shew C. to be in insolvent circumstances. That the judge's charge was virtually to the effect, "That if C. had sold his only horses, when as a farmer he needed them, and when the sale so made would imply a suspicion that the same was not in the ordinary course of dealing, and that if the plaintiff had then purchased, the sale would not have been *bona fide*," and that such direction was in accordance with the statute. *Tuer v. Harrison*, 449.

2. *Interpleader issue—Rejection of evidence—New trial.*]—On the trial of an interpleader issue, the defendants offered in evidence a letter

from the judgment debtor to them, which was rejected. On motion for a new trial, for the improper rejection of evidence, *Held*, that as it appeared from the evidence that the plaintiff allowed the judgment debtor to make other declarations with respect to the property, it might be presumed that he permitted him to make those contained in the letter, which was offered in evidence and rejected; that there being such a foundation laid at the trial as shewed *prima facie* a joint interest, or an interest of some kind, between the plaintiff and the judgment debtor with regard to the goods in question, that therefore the letter was admissible as evidence. *Harnden v. Bank of Toronto*, 496.

3. *Interpleader issue — Purchase under chattel mortgage — Change of possession after.*]—An interpleader issue to try the right of plaintiff to goods seized under an execution against Laffer. A verdict was given for plaintiff for the part of the goods contained in a chattel mortgage to one Lawrence. The judgment debtor mortgaged certain goods to Lawrence under a power of sale, in which mortgage the goods were sold to F. as agent for plaintiff and defendant, they giving their notes therefor, which satisfied the mortgage. *Held*, that the notes given having gone to pay L.'s mortgage, the same was satisfied, and plaintiff and defendant having bought under the mortgage, and become absolute purchasers of the goods, neither had any right to enforce any claim under the mortgage to L.; that from the fact of plaintiff and defendant allowing the judgment debtor, after the sale, to carry on business in their names at first, and afterwards in the name of the plaintiff, there would seem to be some secret arrangement not disclosed; that the judgment debtor, after the sale under the chattel mortgage, having continued to have both the possession and disposition of the goods, the defendant might, as a *bona fide* judgment creditor, have insisted on the plaintiff's claim being fraudulent, had he not from the first

been a party to the transaction; that the plaintiff's conduct left it to be inferred that he had transferred all his interest in the property in question, however acquired, to the judgment debtor. *May v. Routledge*, 534.

JOINT CONTRACT.

See TROVER, 1.

JUDGMENT.

Setting aside.]—*See* ABSCONDING DEBTOR, 1.

Bona fides of.]—*See* ABSCONDING DEBTOR, 2.

Appeal after entry of.]—*See* APPEAL.

Action on against executor.]—*See* EXECUTORS, 3.

Action on against sheriff.]—*See* SHERIFF, 2.

Judgment — Costs — Revision of — Execution — Want of reasonable and probable cause for enforcing same — Demurrer.]—The declaration stated, that defendant, S., recovered a judgment in the Queen's Bench against the now plaintiff, for one shilling damages, and that the taxing master of the court improperly allowed the costs of the now defendant, S., at £39 3s. 1d., for which judgment was entered. Proceedings were afterwards taken, and the costs were revised and allowed at £11 3s. 9d., and that for the latter amount, S. was entitled to execution. Yet the defendants wrongfully and maliciously, and without reasonable and probable cause, caused a *fi. fa.* to be enforced by the sheriff for £39 3s. 1d. Demurrer, because the declaration did not allege that the judgment was altered, &c., or that the amount was levied on an execution improperly sued out, &c. *Held*, that the declaration as framed was sufficient, and that plaintiff was entitled to recover thereon. *Dewar et al. (Defendants.) Appellants, v. Carrique, (Plaintiff.) Respondent*, 137.

JURY.

Withdrawing one count from consideration of.]—*See* TRESPASS, 4.

JUSTIFICATION.

To action for libel.—See LIBEL.

—◆—
LEASE.

1. *Lease—Covenant to repair—Breach of—Damages.*—The declaration alleged that the defendant, by lease dated the 1st of October, 1862, did let to the plaintiff certain premises for the term of five years, and that it was mutually agreed between them that the plaintiff should and would well and sufficiently repair and keep repaired the erections, buildings, gates and fences erected or to be erected on the said premises, and that the defendant would find or allow to the plaintiff one half of the cost or expense of repairing the house or tavern, and should and would pay to the plaintiff the whole of the costs and expenses of repairing and erecting the fences and gates erected, or to be erected on the said premises, the said repairs and erections to be paid for by the defendant at the end of the first year of the said term, it then averred that the plaintiff did within the first year of the said term duly repair the said house and duly repaired the said fences and gates, &c., and that the said repairs were valued according to the said lease, and demand made upon the defendant after the expiration of the first year of the lease, for payment of one-half of the costs and expenses of repairing the house and also for the whole of the costs and expense of repairs to and erections of fences and gates on the premises, and alleged a refusal to allow to the plaintiff the amount due him under the agreement out of the rent in accordance with the terms of the lease. The defendant pleaded that the covenant to repair in the said lease was as follows:—"And the said lessee, meaning the plaintiff, doth hereby for himself, &c., &c., covenant to and with the said lessor, meaning the defendant, in manner following * * * that he, the said lessee, his executors, administrators or assigns, some or one of them, shall and will, at the costs and

charges of the said lessee, well and sufficiently repair and keep repaired the erections and buildings, fences and gates erected or to be erected upon the said premises, and the said lessor finding or allowing one-half of the expenses of repairing the house.

* * The lessee to repair fences, the amount to be valued and to be paid by the lessor at the end of the first year of the term, the rails to be taken off the premises if possible." To this the plaintiff demurred, and replied that the meaning of the lease that both the repairs to the house and repairs to the fence were to be paid for by the lessor by the said lease. To this the defendant demurred. Judgment having been given in the plaintiff's favour in the court below, upon appeal *Held*, that on the pleadings, as set out, the defendant was bound to pay half the repairs of the house and all repairs of the gates and fences, and the plaintiff was entitled to judgment. The appeal was therefore dismissed.

Quere—As to the mode in which the effect of a written instrument is to be brought before the court for their decision. *Miller (Defendant) Appellant v. Kinsley (Plaintiff) Respondent*, 188.

2. *Lease—Rent.*—A. by deed conveyed by way of lease certain lands to B. *Habendum*—To have and to hold the said premises unto the lessee, for and during and unto the full end and term of ten years, to be computed from the first day of January, 1863, and from thenceforth ensuing. *Reddendum*—Yielding and paying therefor yearly during the said term, unto the said lessor, his heirs and assigns, the clear yearly rent or sum of \$720, without any deduction whatsoever, the first payment to begin and be made, on the first day of January, 1863, next ensuing from the date of these presents. Covenant by lessee that he would at all times during the continuance of the term, well and truly pay to the lessor the said yearly rent, on the day and time as was thereinbefore limited and appointed for payment thereof. *Held*,—That the second

year's rent became due and payable on the first day of January, A. D. 1864. *Joslin v. Jefferson*, 260.

LEGAL ESTATE.

Words sufficient to pass.] — See EJECTMENT, 5.

LEX LOCI CONTRACTUS.

See FOREIGN CONTRACT.

LIABILITY.

Of local directors of Canada Agency Association.] — See CANADA AGENCY ASSOCIATION.

LIBEL.

Libel for a newspaper publication — Plea of justification — Demurrer.]

— This was an action of libel. The matter relied upon as libellous was that the plaintiff "has for the past twelve months made his paper a receptacle for coarse abuse, scurrilous personalities and in some cases gross slanders on private individuals who happened to come within the pale of his displeasure. That "he has dragged into print in the most offensive manner the names of some of our most respectable and philanthropic citizens, invaded the privacy of their personal relations, and held their peculiarities up to ridicule, and has, by heaping unmerited abuse on some of our most valued institutions, endeavored to turn them into a by-word and a laughing stock."* "There is no doubt a generous impulse in our nature * * * but it is surely carrying such an impulse a great deal too far * * * if we so far lose the sense of his moral turpitude as to elevate into an oppressed hero the man who is suffering the merited consequences of a long course of deliberate, determined, and reckless wickedness." Pleas, (1) Not guilty. (2) Justification; setting out articles from the newspaper published by the plaintiff 21 months previous to the publication by the defendant of the communication complained of, and

alleging that the said matters published by the plaintiff were false and malicious, and that the persons so libelled were persons of good name, &c. Demurrer to the plea of justification, on the grounds, among others, (1) That the defendant having charged the plaintiff with "moral turpitude," &c., was seeking to evade the libel by stating circumstances forming no justification. (2) That if the plea justified any part of the libel, it only justified down to the (*) asterisk, whereas the plea is pleaded to the whole libel. (3) That the plea is multifarious. *Held*, that *prima facie* the articles set forth in the pleas afforded a justification for the alleged libel; that by one of the grounds of objection, the plaintiff admits that the defendant has justified down to the asterisk (*); that the plaintiff having admitted to have done what is alleged, has no ground of complaint because others say that he possesses "moral turpitude," and that his course has been one of "deliberate, determined and reckless wickedness;" that the having spoken of the gentleman therein mentioned by a nick-name, and having ridiculed his religion, would seem to indicate a malicious feeling; that having called another gentleman a "manikin," and having made allusion to other personal defects was an indication of deep seated malice; that the reference to a person who had given a large sum of money to a benevolent institution, could only arise from wanton or reckless feelings; that the reference in articles 5, 6, and 7, gross terms, to a gentleman's lameness and manner, and also to his appetite, could only have been influenced by bitter and malignant feelings; that if any series of attacks on individuals could justify the charge of "moral turpitude," and deliberate, determined and reckless wickedness, these did; that the justification, as stated, was a sufficient answer to the charge. *Held*, further, that in accordance with the decision of *Brown v. Beaty*, 12 U. C. C. P. 107, the plea was not bad on the ground of multifariousness. *Stewart v. Rowlands*, 485.

LOSS.

Of deed, how proved.—See EJECTMENT, 8.

Of ft. fu. lands.—See EJECTMENT, 10.

Proof of, by fire, under oath.—See INSURANCE, 3.

MAGISTRATE.

Jurisdiction of, for county, within city limits.—See PERJURY, 1.

Magistrate—Conviction by—Wrongful arrest—Quashing of conviction—Notice of action—Con. Stat. U. C., ch. 126.—Action against a magistrate for wrongful arrest and imprisonment, upon a conviction for selling spirituous liquors without license, contrary to a by-law, &c. The first count of the declaration was in trespass, the second in case—to which the defendant pleaded not guilty, by statute, &c. At the trial the selling of the liquor, for which plaintiff was convicted, was fully proved; also that the conviction had never been sealed. A verdict was rendered for the plaintiff for \$100 on each of the counts in the declaration. On motion, in the alternative, for a nonsuit or a new trial, *Held*, 1st. That under sec. 3, ch. 126, Con. Stat., an action of trespass will not lie against a magistrate until the conviction complained of has been quashed. 2nd. That the conviction referred to never having been sealed, it was not necessary to treat it as a valid conviction and to have it quashed before action brought. 3rd. That notwithstanding the conviction was void, the defendant was entitled to notice of action, as he was acting in his official capacity of magistrate and had jurisdiction over the plaintiff and the subject matter, &c. 4th. That as only one wrong was complained of by plaintiff, he cannot recover on the two separate counts, but must elect on which of them he will enter his verdict. *Semble*, that plaintiff cannot recover on the first count because the magistrate had jurisdiction, &c., and by the provision in the statute the action should be in case charging

malice. 5th. That on which ever count the verdict is entered the damages must be reduced to three cents under Con. Stat. U. C., ch. 126, sec. 17, as plaintiff was proved “guilty of the offence of which he was convicted,” and that in this respect the statute applies as well to actions of trespass as to case. 6th. That the statute does not require any particular addition or description of the magistrate to be given in the notice of action served upon him. *Henry Haacke v. Peter Adamson*, 201.

MAINTENANCE.

When deed not vitiated by.—See EJECTMENT, 3.

MALICE.

In enforcing execution for more than due.—See JUDGMENT.

MALICIOUS PROSECUTION.

Malicious prosecution—Embezzlement—Nonsuit.—Action against defendant for charging plaintiff before a justice of the peace with embezzlement, without reasonable and probable cause. On the trial of this case the affidavit by which the information was laid, the warrant and arrest thereunder, were proved. Also evidence was given that the defendant had preferred a charge against plaintiff before the grand jury, and that they had ignored the bill. On this evidence the plaintiff was nonsuited. Upon motion to set aside the nonsuit. *Held*, that the ignoring of the bill by the grand jury was some evidence of want of reasonable and probable cause, and the nonsuit was set aside and a new trial ordered without costs. *McCreary v. Bettis*, 95.

MANDAMUS.

Mandamus nisi—Return thereto—Stats. 18 Vic., ch. 180, and 20 Vic., ch. 146—Limitations of remedy under.—The *mandamus nisi* set out the provisions applicable in statutes 18 Vic., ch. 180, and 20 Vic., ch.

146, by which the prosecutors claimed the right to have an arbitration to settle the amount of their claim against the Great Western Railway Company. The company returned to the writ, that the prosecutors had not commenced proceedings to entitle them to a reference within six months after the passing of the first act. The prosecutors demurred, contending the provisions of the first act had been altered and extended by the second act, and they had done all that the second act required of them to establish their claim to have an arbitration. *Held*, that under 18 Vic., ch. 180, the prosecutors would have been barred, not having commenced proceedings within 6 months after the passing of that act. That 20 Vic., ch. 146, having extended its provisions much beyond those of 18 Vic., ch. 180, and extended the rights thereunder beyond those explained in sec. 1 to be within the meaning of the words private rights, the right defined in the 20 Vic., ch. 146, were not restricted by the provisions of 18 Vic. to those only who had commenced proceedings within six months of the passing of the latter act. That the notice required to be given within three months after the passing of the act 20 Vic. was the only condition precedent to the prosecutors' right to recover. *Held*, further, that the prosecutors were entitled to a mandamus under 20 Vic., though they might have submitted their case to a jury as well as to arbitration had they so chosen. *Semble*, that the court would not have interfered by mandamus had not the prosecutors' remedy by suit probably been barred by 16 Vic., ch. 99, sec. 10. *The Queen on the prosecution of the Trustees of St. Andrew's Church v. The Great Western Railway Company*, 462.

MARRIED WOMAN.

Certificate of Acknowledgement.]—*See* DEED, 2.

MEMORIAL.

No evidence when executed by grantee.]—*See* DEED, 1.

MERGER.

Of promissory note in mortgage.]—*See* PROMISSORY NOTE, 5.

MISCONDUCT.

Of Attorney.]—*See* ATTORNEY, 2.

MISDEMEANOR.

Misdemeanor—Indictment—Form of—Evidence.]—The indictment charged on B. C. with obtaining by false pretences, from one Jacob Teets, two horses, with intent to defraud. The second count alleged that Richard Connor and Owen Monaghan, on the day and year aforesaid, at the village of A., unlawfully, fraudulently and knowingly, were present aiding, abetting and assisting the said Benjamin Curry, the misdemeanor aforesaid, to commit. *Held*, that the second count was good in law, and disclosed an indictable offence against Connor. *Held*, also, that the evidence set out below was not sufficient to sustain the charge. *Regina v. Connor*, 529.

MONEY.

Money paid under protest—By whom it may be recovered back.)—Plaintiff conveyed his land to Gooding to raise money by mortgage upon it for the plaintiff's use. Gooding did so, and for the plaintiff, paid the defendant's attorney about \$160 under pressure, but under protest. The plaintiff now sues to recover this money back. *Held*, that as the money paid by Gooding was the plaintiff's money in fact, and as no complaint was made that it had not been left expressly to the jury to say whether it was actually the money of Gooding or of the plaintiff, that it might be presumed Gooding had paid it to the plaintiff, or had accounted for it to the plaintiff as he had raised the money for the plaintiff. *Sanderson v. Gairdner*, 330.

MORTGAGE.

By deed poll.]—*See* EJECTMENT, 5.
Right of entry when condition broken.]—*See* EJECTMENT, 9.

On property insured.]—See INSURANCE, 1.

As collateral security.]—See PROMISSORY NOTE, 4.

Merger of note in.]—See PROMISSORY NOTE, 5.

Mortgage — Covenant — Service of process on wrong party.]—In an action on a mortgage, the writ was served upon the mortgagor's father, who by his son (an attorney), entered an appearance and defended the suit, but no notice was given to or proceeding served upon the mortgagor, and a verdict was taken against him thereon. *Held*, that the writ having been served upon the wrong person, and no notice or knowledge of the proceedings having been shewn to have reached the defendant, a new trial was ordered. *Sutherland v. Dumble*, 156.

MUNICIPAL INSTITUTIONS.

Power of county council over road between two townships.]—See COUNTY COUNCIL.

1. *Municipal Institutions' Act*, sec. 294, sub-secs. 4 and 15 — *Harbour dues — Firewood — Tolls thereon.*]—*Held*, that a clause in a by-law which imposed tonnage dues on scows, craft, rafts, railway cars, &c., coming into the city of Kingston, containing firewood to be exposed or offered for sale, or marketed for consumption within the city, was illegal, and not authorized by sub-sec. 15 of sec. 294, of the *Municipal Institutions' Act*; the toll or duty must be imposed upon the vehicle in which anything is exposed for sale in any street or public place. The fourth sub-section of the same section only authorizes the imposition of reasonable tolls on vessels and other craft, for the purpose of cleaning and repairing harbours, and paying a harbour master, and does not sanction the levying such dues for the revenue purposes of the municipality to which the harbour belongs. *In re Campbell and The Corporation of the City of Kingston*, 285.

2. *Municipal by-law—Intoxicating liquors—Sale of—Con. Stat. U. C. ch. 54.*]—A section of a by-law passed by a municipality prohibiting the sale of intoxicating liquors on Sunday to all persons, without excepting the sale thereof to travellers and boarders, *held* invalid. A section of a by-law prohibiting the sale of intoxicating liquors to idiots and insane persons, *held* good. *In re Ross v. The Corporation of the United Counties of York and Peel*, 171.

NEGLIGENCE.

In using due skill and diligence.]—See PHYSICIAN.

By captain of steamer.]—See STEAMBOAT.

NEW TRIAL.

In action by sheriff for rent under statute.]—See ABSCONDING DEBTOR, 2.

On ground of verdict against evidence.]—See INSURANCE, 2.

For rejection of evidence.]—See INTERPLEADER, 2.

Where wrong person served.]—See MORTGAGE.

Verdict not to be disturbed unless clearly wrong.]—See PROMISSORY NOTE, 3.

On discovery of corroborative evidence.]—See PHYSICIAN.

Affidavits of facts not new, not receivable.]—See RAPE.

Where nonsuit taken in deference to judge's ruling.]—See REPLEVIN.

Where verdict contrary to evidence.]—See PROMISSORY NOTE.

New trial—Motion for by attaching creditor—Rule for payment of costs—Abandonment of—Costs of in such case.]—One M., an attaching creditor of defendant, applied to this court for a new trial of this cause, and the rule was made absolute granting same on payment of costs. The rule was taken out but never served, and subsequently M. gave plaintiff notice that he abandoned same. On application by plaintiff on notice to M. to shew cause why

said rule should not be discharged with costs to be paid by M. *Held*, that the application by M. was in the nature of a collateral proceeding, and though he might, when voluntarily seeking the aid of the court, have been ordered to pay the costs of opposing the rule which he had obtained, he could not now be ordered to pay the same when brought before the court by compulsion, and not being a party to the record. *Lavis v. Baker*, 336.

NONSUIT.

In action for malicious prosecution.
—See MALICIOUS PROSECUTION.

NOTICE.

To municipality by road company.
—See ROAD.
Of action.]—See MAGISTRATE.

NOTICE OF TRIAL.

Notice of trial — Amendment of pleadings.]—After issue joined, and notice of trial served in a cause, the plaintiff applied to a judge to strike out a plea without prejudice to the notice of trial and other proceedings. The order to strike out the plea was granted, but the judge refused to order that the notice of trial, &c., should stand as good for the then altered state of the record. The plaintiff, notwithstanding, proceeded with his case as if the original notice was good, and altered his record to suit the state of the proceedings (The notice served was notice of trial, while the striking out of the plea required notice of an assessment of damages.) A verdict having been taken, and damages assessed, upon motion to set it aside, *held*, that the proceedings were irregular; a new trial was therefore ordered. *Dickson v. Grimshawe*, 273.

PAYMENT.

In fulfilment of contract made to be performed in U. S.]—See FOREIGN CONTRACT.

By endorser.]—See PROMISSORY NOTE, 3.

PERJURY.

1. *Perjury — Conviction for — Magistrates for county — No jurisdiction within the limits of a city situate therein — Con. Stat. U. C. ch. 112.*]—The prisoner being indicted for perjury in giving evidence, upon a charge of felony against one E. G., it appeared that the felony, if committed at all, was committed in the county of Middlesex. The justices before whom the examination took place entertained the charge and examined the witnesses within the city of London. The defendant's counsel objected at the trial that the justices being justices of the county of Middlesex, had no jurisdiction, sitting in London, to examine into an offence committed outside the limits of that city. The learned judge overruled the objection, reserving the case under ch. 112 of Con. Stat. of U. C. Upon motion, *Held*, that the conviction was illegal. It was therefore reversed. *Held*, also, that Imperial Stat. 28 Geo. III., ch. 49, sec. 1, is local in its character, and is not in force in this province. *Regina v. Richard Row*, 307.

2. *Perjury — Indictment for — Variance of charge in the information and indictment — Quashing of for.*]—Where prosecutor has been bound by recognizance to prosecute and give evidence charged with perjury in the evidence given by him on the trial of a certain suit, and the grand jury have found an indictment against the defendant, the court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information. *The Queen v. Broad*, 168.

PHYSICIANS.

Physician — Skill and diligence, want of — Corroborative evidence — Discovery of — No ground for new trial.]—Action against defendant, a medi-

cal man, for neglecting to use due skill and diligence in the setting of plaintiff's thigh bone, which had been fractured. On the trial, the evidence of the professional witnesses generally went to shew that the plaintiff's case had not been properly treated, at the same time suggesting that the proper treatment in such a case would greatly depend upon the condition of the patient, and particularly upon the condition of the knee, which it came out on cross-examination of plaintiff's witnesses, had also been injured more or less. On motion for a new trial on affidavits of the discovery of further evidence shewing plaintiff's knee had been seriously injured, *Held*, that a new trial will never be granted on the discovery of new corroborative evidence. *Fawcett v. Mothersell*, 104.

PLEADING.

Special plea to common counts.]—*See* CONTRACT.

Plea to action on a policy.]—*See* INSURANCE, 3.

Consideration not necessary in action of misfeasance.]—*See* INSURANCE, 4.

Justifying libel.]—*See* LIBEL.

Amendment of.]—*See* NOTICE OF TRIAL.

General issue—What evidence admissible.]—*See* TROVER, 2.

Pleading—Cause of action set up as a defence in former action—Demurrer—Estoppel—How far conclusive before judgment.]—Action on a contract to make and deliver tweeds of a good merchantable quality. Plea, that the plaintiff ought not to prosecute this action, because before the commencement of this suit the now defendant impleaded the now plaintiff for the price of the goods, in declaration mentioned, and the now plaintiff paid into court \$187 53, and, as to residue, pleaded "never indebted," whereupon issue was joined, and at the trial of said issue the now plaintiff gave in evidence that the

goods were not of a merchantable quality, fit for sale, and the judge told the jury if they were not of a good merchantable quality, this should be taken into their consideration in reduction of damages, and thereupon the jury gave a verdict for the now defendant for \$1,697. Demurrer to plea on grounds that the matters alleged in declaration could not have been given in evidence in defence of the former action; that it did not appear from the plea that the jury pronounced any verdict with reference to the deductions claimed; that it did not appear whether the now defendant had recovered judgment for any thing claimed by him. *Held*, that where goods are sold with warranty, or supplied according to contract, it is competent for the defendant to defend himself, by shewing how much less the subject matter of the contract is worth by reason of the breach of contract, and to the extent he obtains an abatement from the price he is considered as having received satisfaction for the breach of contract, and so far is precluded from recovering in another action. That the plea shewed sufficiently that the subject matter complained of herein, was submitted to the jury in the former action, in abatement of the price to be allowed the plaintiff in that action, and that they found for the plaintiff. That if the now plaintiffs were allowed damages in the former action, in abatement of the price of the cloth, they would be precluded from recovering them again; and that if they were not allowed them, because the cloth was not inferior; it was likewise against public policy that the matter should be again litigated. *Held*, also, that the claim for loss of profits, which could not have been considered in the other action, was not laid in the declaration as a substantive ground of action, but introduced incidentally at its conclusion. *Held*, further, that the verdict in the former action was not conclusive until it had proceeded to judgment, and therefore plaintiff was not precluded from maintaining this action. *Gordon et al v. Robinson*, 566.

PLENE ADMINISTRATIVIT.

Replication lands an admission of the truth of.]—See EXECUTOR, 3.

PROMISSORY NOTE.

Cannot be varied by parol agreement.]—See TRUSTS.

What is not.]—See ACCOUNT STATED, 2.

1. *Promissory note—Interest—Rate of in note—Measure of damages.*]—

Defendant having made his promissory note payable two months after date, with interest at the rate of 20 per cent. per annum, and having made default in payment thereof at maturity, upon the trial of the case in an action brought by the holder the plaintiff, against the defendant, the learned judge left it to the jury as a question of damages as to the amount they would allow after the note became due, not exceeding 20 per cent., which was objected to by plaintiff's counsel. The jury found for plaintiff, allowing interest only at six per cent. after the note matured. Upon motion to increase the verdict by the difference between 6 and 20 per cent. on leave reserved, *Held*, that the rate of interest agreed upon by the terms of the note is the amount which should be allowed by the jury as interest when allowing interest in the nature of damages, from the maturity of the note to the entry of judgment.—*Montgomery v. Boucher et al.*, 45.

2. *Promissory note—Award—Indebtedness under—Set-off.*]—First count of declaration on a promissory note for \$400. Second, for the indebtedness of defendant in the sum of \$85 18, under an award founded on a submission leaving all matters in difference, whether partnership or otherwise, to arbitration. Pleas—1st. Payment. 2nd. Set off on common counts. A verdict was rendered for plaintiff at the trial for \$673 93. On a motion to set aside the verdict on the grounds, 1st. That the arbitrators exceeded their authority in making their award. 2nd. That since the making of said award, money had been received by

plaintiff to defendant's use. *Held*, that as no defence had been set up to the award at the trial, and as no action has been taken to set aside the award, the defendant could not now set up such a defence; and if moneys have been received by plaintiff to defendant's use, as alleged by defendant, since the making of the award, it was open to defendant on the pleadings to have shewn same at the trial, and he is not, therefore, entitled to have another opportunity of setting up that defence. *McKenzie v. Sommers*, 97.

3. *Promissory note—Endorser—Payment by—New trial.*]—Declaration on a promissory note made by defendant payable to J. L. T. 3rd plea. That on maturity of the note J. L. T. paid the amount thereof to plaintiff, and thereby became the holder thereof, and while he was such holder defendant paid J. L. T. all moneys due in respect thereof. At the trial evidence was given by defendant which shewed that J. L. T. had paid the amount of the note to plaintiff, and that defendant had paid J. L. T. J. L. T. was called by plaintiff to rebut this evidence, and he contradicted it. Letters were also put in which went to corroborate facts set up by defendant. The whole case was left to the jury and they found for defendant. On motion for new trial, the verdict being against evidence, and for surprise by the evidence put in by defendant, the same being false, and on affidavits contradicting it. *Held*, that as by the affidavits filed on this application it appeared the plaintiff asked for a new trial to adduce corroborative evidence of that given by J. L. T., whereas he might have taken a nonsuit had he been so advised, he is not entitled to a new trial. The rule being that "having speculated on the chances of success before the jury, he is not in a position, in case of failure, to ask the court to give him an opportunity of presenting his case to another jury." The rule in relation to new trials is that the verdict ought not to be disturbed unless it is clearly wrong. *Hooper v. Chirstoe*, 117.

4. *Promissory note—Collateral security for by mortgage—Discharge of estoppel.*]—Plaintiff being indebted to defendant on a promissory note for \$106 and book debts, executed a mortgage to him for £50. The land in said mortgage comprised was sold by plaintiff, and after payment of the prior incumbrances thereon there was left the sum of \$90 to be applied on defendant's mortgage, on payment of which sum defendant executed a discharge thereof. Defendant subsequently sued plaintiff in a Division Court for a balance on said note and book debts, and recovered the sum of \$——. Plaintiff now sues defendant for fraud, in defendant's having sued him for said note, alleging that when said mortgage was given, defendant agreed to give up said note when the mortgage was satisfied. *Held*, 1st. Declaration not proved in fact. 2nd. Discharge of mortgage not being under seal, not an estoppel. 3rd. That if declaration had been proved plaintiff could not, after failing in division court suit, maintain the action. *Bighton v. Staley*, 276.

5. *Promissory note—Collateral to mortgage—Merger of in new mortgage—Evidence—New trial.*]—An action on a pro. note for \$350. Pleas, that the note had been taken as collateral to a mortgage, in satisfaction of which the defendant and plaintiff had come to a settlement, and the defendant had given a new mortgage for what he owed the plaintiff, and the note had thus become merged in the new mortgage. The plea having been upheld by the jury, on motion by plaintiff for new trial, on the ground of the verdict being contrary to evidence and the judge's charge. *Held*, That the note having been taken by the plaintiff as payment of part of the mortgage, and thus separated from the mortgage debt, the plaintiff was entitled to recover. That from the evidence it appeared that the note was given for a sum quite distinct from the mortgage debt. *Semle*, That the defendant's remedy (if any) should be either to have the settlement re-opened on

the ground of mistake or fraud, and get the amount of the note added to the mortgage debt and extended for ten years. or to treat the settlement as evidence of everything having been paid, which latter defence would be covered by a plea of payment. *Boulton v. McNabb*, 598.

POLICY.

- Declaration on.*]—See INSURANCE, 1.
Action on.]—See INSURANCE, 2.
In action against agent for misfeasance.]—See INSURANCE, 4.
Condition in.]—See INSURANCE, 5.

POSSESSION.

- Of infant having title to land, good.*]—See EJECTMENT, 3.
Demand of before action when necessary.]—See EJECTMENT, 6.
Under voluntary conveyance.]—See EJECTMENT, 7.
Actual and continued change of.]—See INTERPLEADER, 3.
Actual possession necessary to maintain trespass.]—See TRESPASS, 1.
Purchaser has right to claim within twenty years from date of deed.]—See TRESPASS, 2.

POWER OF ATTORNEY.

- Execution of deed by.*]—See CANADA COMPANY.

PRACTICE.

- After removal by certiorari.*]—See CERTIORARI.
In error and appeal.]—See ERROR AND APPEAL.

PRESUMPTION.

- As to deed thirty years old.*]—See DEED, 2.

PROCESS.

- Service on wrong person of same name.*]—See MORTGAGE.

PROHIBITION.

- Writ of.*]—See DIVISION COURT.

PROTEST.

Money paid under.]—See MONEY.

PUBLICATION.

Of anti-christian works.]—See TROVER, 2.

QUASHING.

Laches in application to quash by-law.]—See BY-LAW.

Of indictment for variance from information.]—See PERJURY, 2.

QUO WARRANTO.

Municipal elections—Quo warranto.]—The court discharged a rule for leave to file an information to disturb a person in the exercise of an office to which he was elected for one year, without opposition; the person applying for the leave having been present at such election, and having then made no objection to the person elected, and the application not having been made within the time prescribed by the Municipal Act. *In re Kelly (Relator) v. Macarow*, 313.

2. *Application for quo warranto—Want of qualification in an alderman—Proceedings to unseat—How made.*]—In this case a rule was issued calling on M., an alderman, to shew cause why an information in the nature of a *quo warranto* should not be exhibited against him; upon the ground that the said M. had not the property qualification required by statute. (The objection to the qualification being that though he was rated for 1863 to the amount of \$344, on leasehold property, yet since May, 1863, he had ceased to hold part of the property to the value of \$160 per annum.) It appeared that the said M. and one B. were elected at the January election without opposition; that the relator stood by and made no objection to the return of M. *Held*, that the court, in carrying out the obvious intention of the legislature, will not grant leave to file an information in the nature of a *quo warranto*, to

disturb a person in an office which he holds only for a year, and at whose election the relator was present and made no opposition. That Con. Stat. (Municipal Act) 127, has rather limited than increased the number of persons allowed to be relators by 12 Vic. ch. 81, sec. 146. That the legislature having provided a cheap, speedy and convenient remedy, the court will not, in general, allow parties to resort to the more expensive one. That the general practice is to confine parties aggrieved to the relief to be obtained under the statute. *Quære*, whether the qualification set out was sufficient, *Reg. ex Rel. Dexter v. Gowan* being opposed to such a conclusion. *In re Kelly (Relator) v. Macarow (an Alderman)*, 457.

RAPE.

Rape—Evidence—Affidavits not received on motion for a new trial.]

—Upon motion for a new trial under Con. Stat. of U. C. ch. 112, on behalf of a prisoner who had been convicted of rape, the weight to be attached to the evidence upon which the conviction was found being entirely a question for the decision of a jury, the court in its discretion refused a new trial, although not entirely satisfied with the finding of the jury on the facts proved. *Held*, also, that affidavits of facts which were not shewn to have become known since the trial, were not admissible on a motion for a new trial. *The Queen v. Chubbs*, 32.

REASONABLE AND PROBABLE CAUSE.

Want of.]—See JUDGMENT.

In arrest for embezzlement.]—See MAGISTRATE.

REGISTRY BOOKS.

Con. Stat. U. C. cap. 89, secs. 2, 4, and 72—City separated from county for registration purposes—Registrar not bound to furnish copies of books, &c.]—Where the registrar of the county of F., after the

city of K. was separated from the county for registration purposes, furnished to the registrar for the city a statement of titles to land before separate books were kept for the city. *Held*, that the plaintiff was not bound to furnish the copies he had supplied, and that the defendants were not obliged to pay for them, the case in question being a *casus omissus* from the act. *Durand v. The City of Kingston*, 439.

RENEWAL.

Of ft. fa. more than once.]—See EXECUTION, 2.

RENT.

Construction of lease as to payment of.]—See LEASE, 2.

REPLEVIN.

Replevy of timber.]—See SALE.

Action on replevin bond—Damages occasioned by writ—Evidence—New trial.]—An action by the assignee of a replevin bond for costs incurred in setting aside the writ, and for damages for detention of vessel replevied. Plea, *non damnificatus*. At the trial it appeared that the plaintiff had caused the vessel for which the writ of replevin had issued to be seized on certain *ft. fas.* placed in the sheriff's hands prior to her being replevied. The plaintiff wished to show that his object in seizing under the *ft. fas.* was to prevent defendant taking possession of her under a writ of replevin. This evidence was rejected. The plaintiff then accepted a nonsuit in deference to the judge's ruling. On motion for a new trial for misdirection and rejection of evidence, *Held*, that the plaintiff, having taken a nonsuit out of deference to the judge's ruling, was not prevented from moving against it: that the plaintiff's property being seized under the writ of replevin, he had to take steps to defend the same, and was entitled to his costs of defence. What the other damages were, and whether they arose from

the issuing of the writ of replevin, was for the jury. *Quare*, whether those damages could be recovered on this bond. *Semble*, that the statement by an attorney of the reason of issuing *ft. fas.* was no evidence to enhance damages occasioned by the replevin. *Burn v. Blecher*, 415.

REPLICATION.

Of lands against executors, effect of.]—See EXECUTORS, 3.

RETURN.

To mandamus nisi.]—See MANDAMUS.

False return by sheriff.]—See SHERIFF, 1, 3.

REVIVOR.

Writ of.]—See SURETY FOR SHERIFF.

RELATORS.

Who allowed to be.]—See QUO WARRANTO, 2.

RIGHT OF ENTRY.

When condition in mortgage broken.]—See EJECTMENT, 9.

RISK.

Increase of.]—See INSURANCE, 2.

How far increase of vitiates policy.]—See INSURANCE, 5.

ROAD.

Opening of.]—See BYE-LAW.

Jurisdiction of County Council over.]—See COUNTY COUNCIL.

Road company—Notice by to municipality—16 Vic. ch. 190, sec. 3—*Tolls.*]—*Held*, that the clause in the stat. 16 Vic. ch. 190, sec. 3, that "no company formed under this act shall commence any work under thirty days after the directors have served a written notice upon the head of the municipality, in the jurisdiction of which such road or

other work connected therewith is intended to pass or to be constructed," &c., is directory and not compulsory; and in this action against a road company by plaintiff, for compelling plaintiff to pay toll on their line of road: On demurrer, *held*, that the defendants were not obliged to plead the giving of notice directed by the statute, but that plaintiff was obliged to reply the same if he wished to dispute the right of defendants to compel the payment of toll. *Couse v. Hannan et al.*, 26.

SALE.

Of land for taxes.]—See ASSESSMENT.

Contract for sale of land.]—See EJECTMENT, 6.

By sheriff within 17 sec. of Stat. of Fraud.]—See EXECUTION, 1.

Bona fide sale in course of trade.]—See INTERPLEADER, 1.

Sale of standing trees—Timber manufactured therefrom—Right of possession—Replevin.]—Plaintiff having by parole agreed with the defendant for the sale to and purchase by the latter of certain standing trees, permitted defendant to cut the same down and to manufacture them into square timber. Subsequently a dispute having arisen (the defendant in the meantime having removed the timber from the land), plaintiff replevied same. *Held*, That by permitting defendant to cut down and manufacture the timber, the plaintiff thereby gave up possession thereof, and his lien for purchase money was lost to him in consequence. *McCarthy v. Oliver*, 290.

SEAL.

Necessary to bind a trading corporation to an executory contract.]—See TRADING CORPORATIONS.

SERVICE.

Of on wrong party.]—See MORTGAGE.

SHERIFF.

1. *Action against for rent under Statute.*]—See ABSCONDING DEBTOR, 2.

Recitals in deed from.]—See EJECTMENT, 2.

Sale by within 17 sec. Stat of Fraud.]—See EXECUTION.

Action against sheriff—False return—Misconduct by parting with possession of goods seized.]—Action for not levying, although debtor had sufficiency of goods. Pleas—not guilty—also that debtor had not more goods than defendant had sold and returned. At the trial a verdict was found for the plaintiff for much less than he claimed. On motion for a new trial, *Held*, that the defendant's statement to the insurance agent, that the goods, when seized, were worth \$6,000, and his declarations to the different creditors that their claims were small as compared with the value of the debtor's goods, were evidence of value against the defendant. That his placing a stranger as his agent in possession of the goods, with authority to sell them in the shop as theretofore, who gave no satisfactory evidence of such sales, and who lost or mislaid or neglected to preserve the books of account which would have explained all these transactions, made him responsible for the consequences of his agent's misconduct, and that the defendant was entitled to no advantage or consideration, because the books could not be or were not produced. *Hobbs v. Hall*, 479.

2. *Action against sheriff and sureties—Demurrer to declaration—Allegation of judgment recovered.*]—The declaration set forth the statutory covenant of sheriffs and sureties, and alleged that plaintiff caused a writ of *hab. f.c. seis.* and *fi. fa.* to be placed in sheriff's hands, under which he had levied \$151, which he had not paid over. Demurrer by sureties, on ground that no judgment was alleged to have been recovered to warrant the issuing of the *fi. fa.*, and because it is not alleged that the sheriff received the

money while the covenant was in force. *Held*, that the declaration was bad, in not alleging the recovery of any judgment to warrant the issuing of the *fi. fa.* That there being nothing to shew the covenant sued on was qualified as to time, in the absence of such an allegation, the presumption is for the continuance of liability. *Robertson v. Fortune et. al.*, 444.

3. *Sheriff—False returns—Surprise.*—In an action against a sheriff for a false return, the judgment debtor, on whose suit the return was made, being examined, testified to facts upon which the verdict was rendered, and which the defendant afterwards said, took him by surprise. On motion for a new trial, *Held*, that the defendant should have gone to trial prepared to shew all transactions with the judgment debtor in relation to the suit, which not having done or sworn on this motion to what he could prove as facts to warrant a finding in his favor if a new trial should be granted, the rule was discharged. *Young et. al. v. Moderwell, Sheriff*, 143.

STATUTES.

Of frauds (4th sec.)—See GUARANTEE.

Of fraud (7th sec.)—See TRUSTS.

Of frauds (17th section.)—See EXECUTION, 1.

Of limitations.—See EJECTMENT, 3.

11 *Geo. II., ch. 19 sec. 2.*—See TRESPASS, 4.

Imp. Stat. 6 Geo. IV. ch. 75.—See CANADA COMPANY.

16 *Vic. ch. 190.*—See ROAD.

18 *Vic. ch. 180, and 20 Vic. ch. 146.*—See MANDAMUS.

22 *Vic. ch. 94.*—See FORGERY.

24 *Vic. ch. 83.*—See COUPON.

27 *Vic. ch. 13, sec. 2*—*Not retro-spection in operation.*—See EXECUTION, 2.

Con. Stat. U. C. ch. 13.—See ERROR AND APPEAL.

Con. Stat. U. C. ch. 26, sec. 18.—See INTERPLEADER, 1.

Con. Stat. U. C. ch. 38, sec. 9.—See SURETY FOR SHERIFF.

Con. Stat. U. C. ch. 52, secs. 27, 67.—See INSURANCE, 1 & 4.

Con. Stat. U. C. ch. 54, secs. 319, 323.—See BY-LAW.

Con. Stat. U. C. ch. 89, secs. 2, 4, and 72.—See REGISTRY.

Con. Stat. U. C. ch. 112.—See PERJURY, 1. See FORGERY.

Con. Stat. Canada, ch. 6, s. 20.—See VOTERS LIST.

Con. Stats. Canada ch. 99.—See FORGERY.

Stat. 18 Vic., ch. 156, sec. 3—*Application of.*—*Held*, that the preamble and enacting clause of the Statute 18 Vic. cap. 156, apply to all that part of the Township of Niagara which lies between the east and west lines of the Township to the Queenston and Grimsby macadamized road, and should not be limited to the first concession only. *Clement v. Clement et. al.*, 146.

STAY OF PROCEEDINGS

When summons enlarged.—See SUMMONS.

STEAMBOAT.

Steamboat—Accident to passenger by—Negligence of owner in landing passengers—Verdict against weight of evidence—Form of rule.—Plaintiff was a passenger by defendant's steamboat from T. to N. Persons in charge of the boat refused to stop at the wharf at N. in the ordinary manner to land passengers, but ran the boat along close to the wharf, when plaintiff jumped ashore while the boat was in motion and received serious injury by falling when doing so. The judge directed the jury that the defendant was responsible if he did not land the passengers in the ordinary and careful manner, but that the plaintiff could not recover if the injury to him arose from his own want of care in jumping or hurry in landing. The jury having

found a verdict for defendant, a new trial was ordered on payment of costs, as the verdict was against the weight of evidence. *Held*, 1st. That a steamboat owner who departs from the ordinary and proper method of landing passengers is responsible for the increased danger of the method he adopts. 2nd. It is a sufficient statement of the grounds on which a rule *nisi* is moved to say that the verdict is against law and evidence, without stating in what manner it is contrary to the evidence. *Cameron v. Milloy*, 340.

STRIKING OFF.

Of attorney from roll of court.
—See ATTORNEY, 1.

SUMMONS.

Summons — Enlargement of — Stay of proceedings thereby.—*Held*, generally speaking, that a summons calling on a party to shew cause, operates as a stay of proceedings after it is returnable, and an enlargement thereof by consent of parties continues the stay. *Crooks v. Dickson*, 83.

SURETY FOR SHERIFF.

Con. Stat. U. C. chap. 38, sec. 9—Liability of executors of deceased surety for sheriff, under—Writ of revivor.—In an action against executors of W. on a judgment obtained against F. as sheriff, and A. & W. as sureties for sheriff. Plea, that no *fi. fa.* issued, indorsed to levy of the goods of the sheriff, in the first place, and in default to levy of goods of A. & W. as required by statute. On demurrer to plea, *Held*, that the statute is directory, and that if endorsement on writ is not in accordance therewith, it may be set aside by the court, but proceedings taken thereunder are not void: That there is nothing in the statute preventing an action being brought on the judgment sued on. *Quære*: Whether plaintiff, on a judgment recovered herein, would not be bound to endorse his writ to levy first of goods of sheriff, &c. As to sufficiency of

declaration: *Held*, that the judgment obtained against two or more was joint; that judgment recovered against two or more defendants does not render them joint contractors within *Con. Stat. U. C. ch. 78, sec. 6*; and that the action could not be maintained against the sureties as survivors, the plaintiff's remedy being by revivor or suggestion under *Con. Stat. U. C. ch. 22, sec. 312*. *Gilchrist v. Weller and Armour (Exrs.)* 404.

SURPRISE.

When a ground for a new trial.
—See SHERIFF, 3.

SURVEY.

See TRESPASS, 3.

Survey—Concession line.—A concession line having been laid out by a Provincial Land Surveyor under instructions from the Commissioner of Crown Lands, upon the petition of the corporation of the township, based upon the assumed application of one half the resident land holders to be affected by the survey, the petition being in the following words: —“To the Reeve and Councillors in council assembled,—We, the undersigned freeholders in the 2nd and 3rd concession south side of Black River, west of Point Travers, in Marysburg, beg to ask your honourable body to petition the government to send a surveyor to establish the concession line according to law between the 2nd and 3rd concession, commencing at the township line running towards South Bay, and by complying with this request your petitioners in duty bound will ever pray. Milford, April 14th, 1860.” On receipt of this petition the corporation passed a resolution in these words: “*Resolved*, That in accordance with the statute 18 Vic., ch. 83, sec. 8, and the prayer of the petition of a majority of the householders to be affected thereby, that there be a survey made between the 2nd and 3rd concessions south of Black River from the township line of Athol, to lot number one in the third concession of Marysburg.”

On the 29th of May, 1860, the corporation of the township of Marysburg petitioned his Excellency to cause this survey to be made, and on the 9th of July, 1860, the Honourable the Commissioner of Crown Lands gave instructions to a Provincial Land Surveyor to survey and establish the concession line between the 2nd and 3rd concessions of the township of Marysburg, commencing at the township line, and running towards South Bay in accordance with the provisions of the Provincial Statute, 12 Vic., ch. 35, and 18 Vic. ch. 83." *Held*, that the application to the corporation, and the resolution by the corporation not being such as the statute requires to authorise an application to the government to cause the survey to be made, that the survey made by the instructions of the Commissioner of Crown Lands, dated the 9th of July, 1860, was therefore unauthorised. *Cooper v. Wellbanks*, 364.

TAXES.

Sale of lands for.—See ASSESSMENT.

Fraudulent representations at sheriff's sale for.—See EJECTMENT, 4.

TENANT.

Of freehold liable for dower.—See DOWER.

At sufferance.—See EJECTMENT, 6.

TIMBER.

Manufactured from trees sold standing.—See SALE.

TITLE.

Defect in.—See COVENANT, 2.

Statement of in application for assurance.—See INSURANCE, 3.

TOLLS.

Imposed on firewood.—See MUNICIPAL INSTITUTIONS, 1.

Right to impose.—See ROAD.

TRADING CORPORATION.

Trading corporation—Corporate seal—Executory contract.—A trading company entered into a written contract, but not under its corporate seal, for the purchase of a quantity of barrels. *Held*, the contract being an executory one and not under seal (notwithstanding that the corporation was a trading one,) the defendants were not liable under the contract for refusing to accept barrels not then manufactured. Nor were they liable for damages for refusing to allow plaintiff to continue to manufacture barrels according to the agreement. *Wingate v. Enniskillen Oil Refining Company*, 379.

TREES.

Sale of standing.—See SALE.

TRESPASS.

1. *Trespass—Right to bring same when plaintiff not in actual possession—Damages—When new trial to review will not be granted.*—Trespass to land. Pleas, not guilty, and that the premises were not the plaintiff's. The question being, whether the plaintiff could maintain this possessory action before actual entry. *Held*, that as to the fences and buildings the plaintiff could not succeed, but as to the land itself and the destruction of the trees he could, the defendants having made no denial of his property therein. That a nonsuit could not be granted on the terms of the rule. That where damages were only \$80, a new trial would not be granted to review the award of damages, though the plaintiff could not maintain his action for part of the premises sued for, the rule governing such cases applying here, viz., that the court will not disturb a verdict for mere damages when it does not exceed \$80. *Jowett v. Haacke et al.*, 447.

2. *Trespass—Deed of B. & S.—Conventional line—Purchaser may recover possession within 20 years after date of deed.*—*Held*, that when a party, by deed, has granted a piece of land to another, though he may

retain possession of part of the land granted, and though the grantee may suppose his grant does not cover such part, yet if the deed does actually cover the land, the grantee is entitled to it, if he asserts his right within twenty years from the date of the grant. *Styles v. Taylor*, 93.

3. *Trespass—Survey.*]—The declaration stated that the defendant broke and entered the east half of lot number twenty in the 6th concession of the township of South Dumfries, and there cut down and destroyed the trees and underwood to wit, &c. The 4th plea alleged that as to the breaking and entering and cutting down and destroying a small quantity of underwood, he, the defendant, at the time when, &c., was in the lawful possession and seised in fee of a part of the west half of the same lot; that the boundary between the two parts was a straight line through the centre of the lot from the front to the rear; that the boundary was in dispute between the plaintiff and the defendant, and they could not agree upon the same, and that the defendant in order to discover and ascertain correctly the boundary, employed and instructed a duly authorised land surveyor to run the said line and establish the said boundary, who, with certain chain bearers and other necessary assistants, in pursuance of such instructions, and in discharge of their duty as such land surveyors, necessarily entered into and upon the land in the first part of the plea mentioned, for the purpose of running the said line and discovering and ascertaining the said boundary, and necessarily and unavoidably cut down and destroyed a small quantity of brush and underwood then growing upon the said land first mentioned, in order to run such line and to discover and ascertain such boundary as they lawfully might, doing no actual damage on the occasion, which are the same trespasses complained of. *Held*, on demurrer to this plea, that a surveyor has no power to enter upon the lands of one neighbour for the purpose of making a mere private survey for

another neighbour. *Turnbull v. McNaught*, 375.

4. *Trespass—Distress*—11 Geo. II., ch. 19, sec. 2—*Withdrawal of count from consideration of jury—Misdirection.*]—The 5th count of the declaration was in trespass for seizing, &c., defendant's goods, and disposing of the same. The 6th count was for illegal distress. To the 5th count defendant pleaded not guilty, that the goods were not plaintiffs, and that he seized and sold them to satisfy arrears of rent, and to the 6th count the general issue by statute, referring to 11 Geo. II., ch. 19, sec. 2. At the trial the only evidence given by plaintiff went to shew the seizure and sale referred to was for a distress for rent, the defendant's counsel contended that as only one seizure had been made the plaintiff should be compelled to elect on which count of the two above referred to he would go to the jury. The learned judge who tried the cause refused to compel plaintiff to elect, but said he would direct the jury that the evidence given applied more to the 6th count than the 5th; after which the plaintiff's counsel addressed the jury, and stated that he withdrew the said 6th count from their consideration. The judge charged the jury that the evidence given applied to the 6th count, and that they should find for the defendant on the 5th count, charging them as if both counts were before them for their consideration. The jury found a verdict for plaintiff on the 6th count for \$100, and a verdict for defendant on the 5th. On motion to set aside the verdict by each party respectively, on the finding on each count, for misdirection, *held*, 1st. That the plaintiff could not withdraw a particular count or issue from the consideration of the jury without the consent of the defendant, so as to prevent them giving a verdict on such count, and the jury in this case should have been directed to find for the defendant on the 6th count, and the case left to them on the evidence on the 5th count. But as substantial justice was done by the finding, a rule for a new trial was refused.

on that ground, but granted to defendant as he might have been misled by the ruling of the judge. *Ruthven v. Stinson*, 181.

TROVER.

1. *Trover—Joint contract.*]—A. & B. having contracted with C. to put in the crops on a certain farm and to do all the necessary farm work thereon for the whole season, and for which they were to have one half of the crops for that year: under the contract A. & B. sowed a quantity of wheat, and B. having absconded, his interest in the wheat, while growing, was sold under an execution issued on a judgment, obtained in the division court, against B. at the suit of D., who became the purchaser thereof. A. subsequently sold all his interest, and that of B. in the wheat, to C., who harvested it. D. having brought an action of trover to recover the one quarter of the quantity of the wheat, claiming to have become the owner of that portion of it by purchase at sale on the writ of execution from the division court, which was produced and proved at the trial, but no certified copy of the judgment signed by the clerk, and sealed with the seal of the court, was produced. *Held*, that as between A. & B. the contract was joint, and that trover by D. for the one quarter sold to him, under the execution against B., was not maintainable. *Held*, also, that as against a party whose goods have been sold under an execution from the division court the production of the writ of execution is sufficient, but that as between a third party and the vendee under the execution, the judgment in support of it should be shown. *Park v. Humphrey*, 209.

2. *Appeal from County Court—Trover for books—Anti-Christian works—Pleading—New trial.*]—An action of trover for pamphlets. Plea, not guilty. On the production of one of the pamphlets sued for at the trial, the judge directed that the plaintiff was not entitled to maintain the action for the pamphlets, because

it was a scoffing and indecent attack on Christianity, and ordered a nonsuit. A new trial being refused in the court below, on appeal. *Held*, that the defendant could not rely on the illegality of the publication under a plea of not guilty, but should have pleaded it specially. That the plaintiff held property in the materials composing the pamphlets, independently of what was printed in them, and he would have a right to be indemnified therefor. *Seemle*, that there was a legal wrong, for which the plaintiff should have recovered something. That the judge below should direct the jury as to nature of works the law protects, and what it prohibits. If the pamphlets are not illegal he should also direct the jury to give damages for their value as a literary production. If the pamphlets are illegal, they should give damages to the value of the paper, &c., irrespective of the words upon the paper. *Boucher v. Shewan*, 419.

TRUSTS.

Statute of Frauds section 7—Trusts—Declaration of—Subsequently made—Takes effect from the creation of the trust—Promissory note—Cannot be varied by parol agreement.]—Action by executors of one D. B. on a promissory note dated 9th of May, 1863, for \$1,600 made by defendant P. and endorsed by defendants C. and B. to which defendant pleaded that in April, 1861, the testator held a promissory note for the same amount made by P. and endorsed by C.; that before the same became due it was agreed by P. and testator that if P. would convey certain lands to defendant C. in trust to secure the said note or any renewals and when and so often as said renewals should become due, that he would give a renewal note endorsed by C. and B. and pay interest at the rate of ten per cent. per annum in advance, that he (the testator) would extend the time for payment of the amount of said note for three years; that upon such agreement P. conveyed

the lands to C. in fee simple, and from time to time, as the notes and renewals became due, P. paid the interest and gave renewals as agreed upon; that when the note now sued upon became due the interest and a renewal note, in accordance with the agreement, was tendered to testator, who refused to accept the same, and that the term (three years) had not expired. The testator subsequently died. On the trial the facts, as set out in the pleas, were substantially proved, and it was shewn that previous renewals had been made by leaving the renewal note at the agency of the Bank of Montreal in Cobourg, paying the interest and taking up the old note, and when the note now sued upon became due a renewal note, in accordance with the agreement, and the interest, was tendered to M. the agent of the said bank, who refused to accept the same, alleging he had no instructions. All the renewals, except one which was made with the testator personally, were made at said bank. The deed was produced at the trial and was absolute on its face to C. and not registered. Several objections were taken at the trial, and on the argument it was thought better to raise the question for the consideration of the court by demurrer, which was done, and the amount to be allowed to stand as an assessment of contingent damages for the plaintiff on the demurrer, was to be fixed by the court. The plaintiff was allowed to demur to the defendant's pleas. *Held*, 1st. That the tender of the renewal note and interest to M. the agent of the Bank of Montreal, where the note was payable, was a sufficient tender, as all the other renewals were made there; that defendant was not bound to tender another renewal and the interest at the expiration of three months from the last tender, as plaintiff had, by his refusal to accept the former tender, repudiated the agreement, and the defendant was not informed that he would accept such renewal. 2nd. That by the 7th section of the Statute of Frauds all express trusts in respect of real

estate require to be in writing, signed by the party who is to declare the trust, and though the deed to C. appears absolute on its face, still it is settled that the statute will be satisfied by any subsequent acknowledgment expressed by him in writing declaring the trust, and that the trust, however late the declaration or proof thereof may be, will take effect from the date of its creation. On demurrer, *held*, that the effect of the defence set up is to vary the terms of the note sued upon by a parol agreement made prior to the note itself, and therefore judgment must be for the plaintiff; that as to the rate of interest to be allowed there is nothing before the court to shew that plaintiff is entitled to a higher rate than the legal rate of interest, except under the agreement which he expressly repudiates, only 6 per cent. can be allowed. *Harper et al. v. Paterson et al.*, 538.

UNITED STATES.

Contract to be performed in.]—See FOREIGN CONTRACT.

VARIANCE.

Between information and indictment.]—See PERJURY, 2.

VENUE.

Change of by order granting writ of certiorari.]—See CERTIORARI.

VOLUNTARY CONVEYANCE.

Void against subsequent purchaser.]—See EJECTMENT, 7.

VOTERS' LISTS.

Indictment—Demurrer to—Con. Stat. cap. 6, sec. 20.]—Demurrer to an indictment. The first count charged that the defendant, after having made the alphabetical list of persons entitled to vote, &c., made out a duplicate original of the said list, and certified by affirmation to its correctness, and delivered the same to the clerk of the peace, and that in making out the certified list,

so delivered to the clerk of the peace, of persons entitled to vote, &c., the defendant did feloniously omit from said list the names of &c., which names, or any or either of them, ought not to have been omitted. The second count was nearly the same as the first, the word "insert" being used where the word "omit" was used in the first. *Held*, that the omission charged having been from the certified list delivered to the clerk of the peace, or "duplicate original," the words "said list," referring to the words "the certified list so delivered to the clerk of the peace," was a sufficient description to identify the list intended. As to the objection that it did not appear that the persons whose names were charged to have been omitted, &c., were persons entitled to vote, &c. *Held*, that the words in the indictment were not a direct and specific allegation that those persons were entitled to vote. As to the objection that it was not alleged that the list was made up from the last revised assessment roll, *Held*, that by the indictment it appeared that the assessment roll referred to was the

assessment roll for 1863, and that it was sufficiently stated that the alphabetical list was made up for that year, and that the Crown would be bound to prove such a list. *Held*, further, that both counts of the indictment were bad, as they should have shewn explicitly how, and in what respect these names should or should not have been on the list, by setting out that they were upon, or were not upon the assessment roll, (as the case might be,) or at any rate were or were not upon the alphabetical list. *Regina v. Switzer*, 470.

WITNESS.

May refresh his memory by memoranda.]—See EJECTMENT, 3.

WORK AND LABOR.

Acceptance of and acquiescence in.—See AGREEMENT.

WRITING.

Consideration of guarantee must be in.]—See GUARANTEE.





